The Madras Law Journal.

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RULE REGARDING CONSTITUTION OF FULL BENCHES.

The other day three Judges sat in Full Bench to consider some important questions. To an ordinary lay mind it seems grotesque to style three Judges of the High Court as a full Bench of the High Court when that High Court consists of ten judges. Even to a lawyer accustomed to formalities and technicalities and accustomed to consider a certain minimum out of a larger number as constituting that larger number, the minimum of three out of ten Judges sounds harsh and opposed to the common sense view of things. The rule of the Madras High Court requiring a minimum of not less than three to constitute the Full Bench of that Court was apparently framed at a time when the number of judges was six. In 1909 this number was increased to 8 and in 1912 this was increased to ten and yet the rule relating to the number of Judges constituting a Full Bench is still continued unmodified and the High Court is still not abreast of the times in making modifications of its own rules. What we are complaining of is not a mere technicality. A real hardship is felt in the administration of justice. While the Judges are so many as ten there is bound to be a diversity of views and in the interests of sound and efficient administration of justice this diversity should be minimised. While there is a conflict of decision upon any particular question the views of three Judges even if the latter are unanimous in their opinion will not be entitled to the same respect as the views of five or six. There is no use of referring to a Full Bench which is to consist of three Judges any particular question upon which there may be a conflict, if their views should be considered as not binding upon others. We see there is a tendency in the Judges themselves not to regard such decisions as binding. Surely the profession and the public are entitled to act upon a particular decision as binding if that decision should be by a Full Bench. But if the Judges themselves do not regard them as binding even for some months, it is impossible for

the profession or the public to place any confidence in that manner of administering justice. We hope it is only by a mistake due to inadvertence or pressure of other work, rule 5, of the Appellate Side Rules has not been modified. We hope therefore that when the next Full Bench is constituted the rule will be modified so as to increase the minimum of Judges constituting a Full Bench.

CRITICAL NOTE.

V. Venkatanarayana Pillai *v.* V. Subbammal.

22 Madras Law Journal 394.

We think the questions raised in this case deserve more consideration than has been bestowed upon them by the judges. A testator executed a will in favour of his wife empowering her to make successive adoptions. After making the will, the testator himself adopted a boy and then made another will: He died and after him his adopted son. The widow, acting under the first will adopted another boy. The question was whether the first will remained operative so as to enable the widow to exercise the power of adoption given by it. It must be mentioned that the second will was declared invalid, because it disposed of ancestral property after the first adopted son had acquired a vested right in it. It was conceded that the second will was inconsistent with the first will. The learned Judges (The Chief Justice and Sankaran Nair J.) dispose of this point by saying that inconsistency by itself will not operate to revoke an earlier instrument, if the latter was invalid. It was also argued that the fact that the testator himself adopted a boy was an implied revocation of the power contained in the first will. We do not find any sufficient answer to this contention in the judgment. It is a well recognised principle that legacies given under a will may be considered to have been deemed by other provisions made for, or payments made to the legatee subsequent to the will—see Jarman page 1157. The widow under the will is charged with a duty: When that duty is performed by the principal, does the authorisation remain in force? It may probably be said that the original duty was to make another adoption in case the first adoptee died; and in adopting to her husband after the boy adopted by her husband died, she was not in any way acting contrary to the direction of her husband. The question deserves more consideration than has been given to it in the judgment.

But the principal question considered was whether the invalidity of the second will revived the original will. In our opinion, the

learned Judges have approached the question from a wrong standpoint. They begin by saying "One would have thought that *prima facie* a devise which was inoperative as a disposition of property would have been inoperative as a revocation of an earlier disposition." We are inclined to think that the *prima facie* impression is wrong. A party who makes a second disposition of property, *prima facie* intends that the original disposition should not take effect. The earlier English authorities recognise this. In later years, a technical rule of pleading prevented this rule from being universally applicable. It was due to the statement of the law that different words should be used to dispose of property from those employed to effect a revocation. Consequently, it became necessary to examine the later will to see whether it contained any words of revocation. This led to the doctrine of what text writers speak of as "*dependent relative revocation.*" The court held that if the will was intrinsically bad it could not have the effect of revoking the earlier instrument. But if its inoperativeness was due to outside causes, it served the purpose of putting an end to the earlier disposition. The question as to what are intrinsic defects and what are extraneous causes is not easy to decide. But we fail to see, in the case before us, how the fact that the testator dealt with property over which he had no disposing power can be said to be an intrinsic defect in the will. See *Baker* v. *Storey* [23 W. R. 147] where Jessel, M. R., held that where the ultimate bequest in the second will failed by reason of its contravening the Mortmain Act the devise under the first will was held not to take effect. The learned Judges recognise that the incapacity of a devisee to take, will not be an intrinsic defect in the will, but will be an external cause. We are inclined to think that the term intrinsic defect should be confined to cases where there is no testamentary capacity in the devisor or when the will is invalid for not complying with certain formalities. His signature to the will and the recitals cannot be said to express his intention in such cases, because there is no will. But where a testator has a disposing state of mind, and there is no formal defect causes which prevent his intentions being given effect to should be regarded as being *dehors* the will. That is the only logical position which the decided cases warrant; and we are of opinion that the question has not been fully considered.

NOTES OF INDIAN CASES.

Dinesh Chandra Roy Choudhry *v.* Biraj Kamini Dasee. I. L. R. 39 C. 87:—In this case it was held that a bequest by a father to the would-be wife of his son would be valid according to Hindu Law provided that the woman who subsequently became his son's wife was in existence at the time of the testator's death; that although such a bequest came within S. 99 of the Indian Succession Act and that section was made applicable to Hindu Wills, it had not the effect of invalidating provisions made in accordance with the principles of Hindu Law. It has been held that it is a general principle of Hindu Law that the donee must be in existence or alive at the time of the death of the testator. What does this mean? Does this mean that the person should be alive though he may not be ascertainable then but may become ascertainable afterwards? If a person is actually alive but he answers the description given by the testator only after his death and the gift in his favour comes into existence after a prior estate created by the testator, that cannot be said to be an exception to the general principle that a donee must be in existence but that is how this principle has been understood as we submit erroneously—by Mr. Justice Mookerjee in this case. In the Tagore case[1] the Judicial Committee while holding that a gift to a person unborn at the time of the gift was invalid observed: "Their Lordships while adopting and acting upon the clear general principles of Hindu Law that a donee must be in existence, desire not to express any opinion as to certain exceptional cases of provisions by way of contract or of conditional gift on marriages or other family provisions for which authority may be found in Hindu Law." Marriage contracts and settlements made at the time of marriage are specially provided for and the Judicial Committee hold that such special cases stand apart and must be given effect to. From this it follows that the Judicial Committee contemplate that there may be gifts to persons unborn which are nevertheless valid. If the gift is given to an unborn son which according to Privy council in the case of special contracts is valid there is no necessity for saying that it is an exception to the general principle and treating it as such but it must be treated as coming within the other special principle recognised by the Judicial Committee.

In the matter of Rudolf Stallmann. I.L.R. 39 C. 164:—A curious contention was raised in this case by the Advocate-

1. (1872) L. R. I. A. Sup vol. 47, 70.

General that the right to take out a writ of *Habeas corpus* has been taken away by the Indian Extradition Act but as Mr. Justice *Woodroffe* observed taking the contention to be that S. 491 of Cr. P. Code was not applicable where the custody of person was sought to be justified by proceedings purporting to have been held under the Extradition Act, there could be no difficulty in showing the contention to be unsustainable as it was a general principle that a supreme right such as that of *Habeas corpus* could not be said to be taken away without an express provision of the legislature. The accused was set at liberty in this case on the ground that he was not given an opportunity of defence. As Mr. Justice *Mookerjee* observed: "The result must be attributed mainly to the tenacity and success with which the advisers of the Crown insisted upon an expeditious termination of proceedings, which in their earlier stages at any rate might with advantage have been characterised by more faithful adherence to statutory provisions on the subject." With reference to a contention on behalf of the Crown that it was not the duty of the Magistrate to adjourn the hearing to enable the accused to produce evidence and that if the Magistrate had adjourned he did it only as a matter of grace, the same learned Judge observed: "This contention is so manifestly unreasonable that I cannot but deem it lamentable that it should have been pressed on behalf of the Crown before the Magistrate, and should have found acceptance with that officer."

Mirsarwar Jan *v.* Fakurddin Mahomed Chowdhuri. I. L. R. 39 C. 232 (P. C.) :—We draw the attention of our readers to the decision of the Judicial Committee in this case "that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property". Though no authorities are cited and the question is not discussed yet being an express decision of the Judicial Committee it will be binding. If it is not within the competence of a guardian to bind the minor or the minor's estate by a contract for the purchase of immoveable property, what about the actual purchase by a guardian of immoveable property or of a sale by the guardian? The decision is far reaching and it may be necessary to review the cases as to sales to or by a guardian.

SUMMARY OF ENGLISH CASES.

In re **A Solicitor** : *Ex-parte*, **the Law Society.** [1912] I. K. B. 302.

Solicitor—Debt collecting agency—Professional misconduct.

In this case a solicitor procured the formation of a bogus debt collecting company, framed and controlled it with a view to its employment by him as an adjunct to his business as solicitor, and that by the agency of that company he systematically solicited debt-collecting business without disclosing his relation to the company; An application was made to the Committee of Law Society for the removal of his name from the list of solicitors for suspension on the ground of professional misconduct. The committee found that he was guilty of professional misconduct. *Held :* that the committee was justified on the facts proved that the solicitor was guilty of professional misconduct within the meaning of the Solicitor's Act.

Brown *v.* **Black** [1912] I. K. B. (C. A.) P. 316.

Solicitor—Bill of costs—Sent by post—One month before action.

S. 37 of the Solicitor's Act provides that no action shall commence until after the expiration of one month after the solicitor has sent by post . . . . the bills of costs to the party to be charged thereunder: *Held* by (*Vaughan Williams* and *Kennedy* L. JJ. *Buckley* L. J. dissenting) that a bill was not sent by post to the party charged therewith unless it was posted at such time as that in the ordinary course of post it should have reached the person one clear month before the action was commenced.

British Association of Glass Bottle Manufacturers, Ltd. *v.* **Nettlefield.** [1912] K. B. p. 369 (C. A.)

Practice—Discovery—Affidavit of documents—Further affidavit.

Where a party required to make an affidavit of documents admits that he has in his possession or power other documents relevant to the matter in issue whether the admission is found in the affidavit of documents itself or in another affidavit made in the process of litigation or in a letter written by the opposite party or in whatever shape it may be the same will be a good ground for requiring a further and better affidavit.

Crouch *v.* **Crouch** [1912] I. K. B. 378.

Deed—Construction—Ambiguity.

A deed of separation after reciting an agreement whereby the husband agreed to pay the wife 5 shillings a week during her life so long as she remained chaste contained a covenant to pay the said sum to the wife.

Held on the true construction of the deed the recital governed the covenant which was ambiguous and that the husband was liable to pay only so long as the wife remained chaste.

In re **Goldburgh** *Ex-parte* **Silver Stone** [1912] I. K. B. 384.

Bankruptcy—Insolvent debtor—Secured creditor—Fraudulent transfer of business to one man company—Bona fide transfer of mortgage without notice for shares—Act of Bankruptcy.

In this case a trader conveyed his business to a one man Company for shares and debentures. He persuaded his mortgagee to accept some debentures in lieu of his mortgage. The mortgagee was no party to the formation of the company. Subsequently the trader became bankrupt and his assignment was set aside as fraudulent. It appeared that the debentures were worthless.

Held that the mortgagee was not restored to the original position and that he could have no charge on the assets of the bankrupt but that he had a right to prove in the bankruptcy for damages sustained by him.

In re **Ashwell** : *Ex-parte* **Salaman** [1912] I. K. B. 390.

Bankruptcy—Petition—Adjournment on payment of money—Misrepresentation—Estoppel—Of official trustee.

Where the debtor obtained an adjournment of a bankruptcy petition by paying the petitioning creditors a sum of £ 125 representing that the money belonged to a third party which was untrue, the trustee could claim repayment of the £ 125 on the doctrine of relation back from the petitioning creditors when the debtor should commit an act of bankruptcy shortly after. The trustee had a better title than the debtor and was not estopped from enforcing the repayment of the money.

In re **Mann: Ford *v.* Ward.** [1912] 1 Ch. 388.

Will—Construction—"Money" at the Savings Bank—Consols not included.

"Money" at the Savings Bank does not include "consols" purchased through the Post Office.

In re **Greenwood: Greenwood *v.* Sutcliffe.** [1912] 1 Ch. 392.

Will—Construction—Gift to A, in case of death during testator's lifetime, etc. Provision that he should be taken to be alive at the testator's death—effect of.

A gift to A with a provision that if he should, in the life-time of the testator, die leaving issue alive at the death of the testator, the gift should not lapse but should take effect as if the legatee's death had happened immediately after the testator's death was perfectly valid. In the event of the legatee's death during the testator's life-time, his personal representatives step into his place and take the property as legatees under the will.

In re **Williams: Williams *v.* Williams** (1912) 1 Ch. 399.

Will—Direction that costs should come out of suing legatee's share—Not applicable to suit owing to trustee's default—Repugnancy.

A testator directed that in case any beneficiary brought a suit for the administration of his estate, his share should pay the costs of all the parties to such an action. *Held*: (i) that the clause did not apply to a suit for administration brought on the ground of the trustee's wilful default, and (ii) that if it did, it was void for repugnancy. It would be in effect saying "I give you certain shares of property, but if you resort to any proceedings whatever respecting it even to secure its enjoyment, I give so much of those shares as is necessary to pay the costs to some one else." This would be repugnant to the gift.

In re **Lord Car and General Insurance Corporation:** (1912) 1 Ch. 405.

Company—Agreement giving option to set off payment as payments of call—Not applicable to calls after liquidation.

An agreement between a director of the company and the company that any moneys which the director might pay under a

guarantee of the company's overdraft at the Bank should be treated at the option of the director, as payments made in advance of the calls though valid, does not entitle him to insist upon the payment being so treated when the payment is made after the company went into liquidation.

Attorney General v. Watford Rural Council.
(1912) 1 Ch. 417.

Highway—Dedication—Long user.

When land has been used for a long time as a highway, by the public, the burden of proving that during all that time there was no one capable of dedicating is on the party setting up such a plea. The mere fact that the way has not been used for a long time as a cartway but only as a footway is not sufficient to cut it down to a footway.

In re **Halston Ewe v. Halston.** [1912] 1 Ch. 435.

Will—Construction—Gift to a person dead to the knowledge of the testator—Evidence admissible to show for whom the gift was intended.

Where a testator gave property to "John William Halston" who to the knowledge of the testator was dead years before the date of the will, evidence was held by *Ewe* J. to be admissible to show that the testator really meant John Robert Halston, a brother of John William.

Cuff v. London & County Land & Building Company Limited. [1912] 1 Ch. 440.

Extent of right—Company's Act S. 112—Auditor—Relation between company and auditor,—Master and servant—Dismissal—Mandatory injunction.

In this case, the directors of a company discovering that the auditors were negligent in the inspection of the receipt books, gave them notice that they should no longer audit the accounts of the company. The auditors brought an action to enforce their right under S. 112 of the Companies Act to have access to the company's books for the purpose of performing their duties as auditors. Pending the action they applied to have an order by way of mandatory injunction for allowing them access in the interim. *Ewe* J. granted the same. On appeal, it was held by the court of appeal:

(i) that the court ought not to have in its discretion granted a mandatory injunction in this case. (ii) though there is a statutory duty in every company to appoint an auditor, he is yet a servent of the company and cannot insist upon continuing to perform the duties of the office when he is told not to do so by the company. His only remedy is an action for damages for wrongful dismissal. (iii) In a case of this sort, the proper course for the court is to direct the company to hold a meeting to consider whether the share-holders would have the auditors to continue and not to grant a mandatory injunction. (iv) The right of inspection conferred by S. 112 of the Companies Act on the auditors is exercisable only when they continue as such and not after the company dismisses them.

Solomon *v.* Attenborough. [1912] 1 Ch. 451 (C. A.)

Executor—Power of pledge and sale—must act as "executor"—Lapse of time—Executor ceasing to be executor and becoming trustees.

The rule that a person dealing with an executor is not bound to enquire whether the sale or mortgage by the executor is required for the due administration of the estate has no application when the executor does not act as such.

Fletcher Moulton L. J. :—When the administration of the estate is closed and the property is handed over to the trustees for legatees, the power of the executor as such ceases, though the executor happens also to be a trustee and as such in possession of the estate.

Buckley, L J.—Lapse of time may be a circumstance which would entitle a purchaser or pledgee to require the executor to make a statement as to the position of the estate so as to shew whether the sale or pledge is justified by the circumstances.

Jarvis *v.* Hemmings [1912] 1 Ch. 462.

Landlord and tenant—Law of Distress Amendment Act, S. 6—Postal Service—Personal service not precluded.

Sec. 6 of the Law of Distress Amendment Act provides that in case of default in payment of rent by the tenant, the landlord may serve upon the sub-tenant in the premises a notice "by registered post addressed to such tenant to pay over the rent to

himself till the arrears shall have been fully paid up. *Held*: the provision as to service by registered post was only to enable the superior landlord to resort to that mode of service and did not preclude her from effecting personal service, which is a superior mode of service.

In re **Neudegate Colliery, Limited Neudegate *v.* The Company.** [1912] 1 Ch. 468.

Receiver and manager of assets—Goodwill to be preserved—Contracts to be respected.

Where at the instance of a mortgagee a receiver and manager of the assets and the undertaking of a company has been appointed, it is the duty of such receiver and manager not to do any thing which will affect the goodwill of the business. Accordingly it is not open to him to disregard the forward contracts entered into before he took possession because if he did that he would be destroying the goodwill of the company though he might be able to realise some more money for the assets of the company.

In re **Earl of Derby and Fergusson's Contract:** [1912] 1 Ch. 479.

Vendor and purchaser—Notice of tenancy—Notice of compensation payable.

When by the terms of the tenancy, the tenant is entitled to compensation for improvements effected with the landlord's consent it is not open to the purchaser with notice of the tenancy to treat the tenant's right as an undisclosed incumbrance and claim compensation in respect of it from the vendor. Having had notice of the terms of the tenancy, it was his duty to have inquired into the actual state of circumstances before making the purchase.

In re **Pink: Pink *v.* Pink.** [1912] 1 Ch. 498.

Debt—Release—Will—Provision that debt should be deducted from legacy—Bankruptcy, effect of.

Entry in the private ledger of the creditor that the debt is released does not operate as a release, nor does the fact that the debtor is appointed executor operate to perfect the imperfect gift evidenced by the entry.

Bankruptcy of the debtor does not put an end to the debt so long as he is not discharged.

A direction that the debt due from the husband to the testator should be deducted from the legacy to the daughter does not cease to operate because the husband became a bankrupt during the testator's life-time. It would have been otherwise if he had been discharged.

JOTTINGS AND CUTTINGS.

AT THE VAKILS' GATHERING.

Now Friends, aye Bretheren-in-law
A welcome sweet awaits us all
From our revered and hoary host.
It's wrought with blessings good and true
As comes it from the doyen of th' bar.
An year more has passed ov'r us
That toil and moil in others' cause
With anxious care and loyal heart.
The life we've sworn to lead is hard.
Indeed, albeit cavillers' talk.
The man with health doth rail at pills
And calls all names the physician;
But when the appetite doth fail.
The earth is scoured for the Galen wise
Who can prescribe ambrosial drugs.
So when a man's affairs go wrong
High and Low is sought the kindly hand
That can and will him lead out clear
Of th' bog that over him had closed.
There's naught that he doth deem too hard
Or e'en impossible for us
To transcend, but to win his cause
The saviour true and kindest friend.
The lawyer then extolled is.
We too thus share the ills of earth
And oft of goods that it doth spare
Our lot bereft is of complaint
As common consent us doth give
The vantage of recruiting ground,
Be it to lend a hand to steer
The wheel of state, albeit quite new
Or guide aright with wisdom ripe
The nation's deliberations;
To judge, be it in company

In face of all the legal lore
Paraded with the junior's aid
Or judge alone in far-off town;
To lead the bar of friends with wigs.
And wigless ones, just as we are,
Hath fallen too to our lot.
It matters therefore not the name
Our calling hath annexed in time;
The anglican wide world of law
May feel a deal perplexed to see
A term unknown to lexicon
Applied to men that lead so oft
In matters great of an Empire vast
But let us steadfast be
And as Vakils go on
For all eternity
We've met to-day and are we part
For th' holiday we've earned so well
Let's merry be and heart and heart
United be, complete and gay,
For it's to-day our gala-day.
The throng doth change as years go by;
Some go to higher spheres of work
While some depart to unknown spheres.
Let's then pass on the cheering cup
Of tea an nothing stronger still
Doth find in us a countenance.
But glance we a bit ou'r year that 's closed
And note how fared our Temple High.
The bapless folks who pinned their faith
To settling folk quick in Courts
Despairing stared at years passed by.
The powers that be to rescue, came
And now the Court hath ten wise men
Presiding ov'r the file's arrears
With pious hope to clear the file
In two years' time. But Sirs, methinks
The earth may circle twice again
But to find the Court a *Zodiac*.
Where twelve bright stars will reign supreme
Till then let's jog on our way.
Thrive will for e'er our dear High Court.

Civilian Judges in India.—There is a considerable school of opinion which holds that in India, as in other countries, 'judicial appointments should be reserved for members of the legal profession who are trained to undertake the duties attaching to them.' As things are, the District (Civil) and Sessions (Criminal) Judges in India are appointed in large part from the ordinary Civil Servants who have, indeed, before their appointment, served as magistrates, but who have not had a thorough legal training or any considerable Court experience. The unsatisfactoriness of the administration of justice which is consequent upon this system is marked by the number of important criminal cases in India where the verdicts of the Sessions Court are quashed or very seriously revised by the High Court to which an appeal has been taken. The recent decision of the Calcutta High Court in the *Dacca Conspiracy Case* is a signal example of this tendency, which has caused general comment. Nearly two years ago forty-two persons were charged with levying war against the King-Emperor by organising societies with seditious objects. After a very protracted trial before the Additional Sessions Judge at Dacca, with two Indian Assessors, thirty-five were convicted and sentenced to terms varying from transportation for life to three years' imprisonment. The Indian Assessors found all the accused 'not guilty,' and, as was to be expected, an appeal was taken to the High Court. The result of the appeal is that twenty-one of those condemned are acquitted, and the sentences on the remaining fourteen are in very case reduced. The case does not stand alone; for in a series of conspiracy prosecutions the High Courts, and especially that at Calcutta, have reversed the findings of the lower Courts. The state of affairs is much to be deprecated. It is said by some that the High Court is too apt to take a lenient view of sedition charges, and that the Courts of first instance in the country are better acquainted with the real seriousness of the movement. But the fact that so many sentences are quashed by the higher tribunal suggests that it takes a different view of the evidence from the Court below, and that because it is a wholly judicial body with a life-long training in the law; whereas the judges below are persons who are apt to look at things from the civilian's point of view. The exact appreciation of evidence is the most valuable gift of the judge, and it comes only to one who has devoted himself to the legal profession. There may be difficulties in manning the Indian bench exclusively from lawyers: but it is very desirable that at least grave criminal charges should be heard from the first before a body which has had a special legal training.—*The Law Journal.* ***

Lawyers and Public Service.—Despite the abusive language which the more reckless Labour leaders sometimes use of the occupants of the Bench, lawyers are frequently chosen to play a distinguished part in the settlement of Labour disputes. More than half the chairmen of the Joint District Boards appointed under the Coal Mines (Minimum Wage) Act are members of the legal profession. These chair men, some of whom have been appointed by the mine owners and miners by agreement, while others have been nominated by the Board of Trade, include two ex-High Court Judges—Lord Mersey and Sir Robert Romer; four County Court Judges—Judge Bradbury, Judge Austin, Judge O'Connor, and Judge Stanger; and three leading members of the Bar—Sir Edward Clarke, K.C., Mr. Francis Williams, K.C., and Mr. A. A. Hudson, K.C. It is a striking tribute to the traditions of the legal profession that so many of these important posts, requiring the qualities of impartiality and sound judgment in a very special degree, should have been offered to lawyers, and it is a pleasing proof of the public spiritedness of some of the hardest-worked men in the country that they should have been willing to accept them. Particularly deserving of recognition is the readiness of two such experienced judges as Lord Mersey and Sir Robert Romer to spend some part of their well-earned leisure in assisting in the administration of the new Act. The services rendered by retired judges of the High Court in the pacific settlement of labour disputes are many and constant; and it is welcome to see that County Court judges and leading members of the Bar have been called in to do like service. The lawyer at his best is the peace-maker *par excellence*, and, however paradoxical, it is true that practice in litigation is the best training for the impartial mind. Some time ago an attack was made on lawyers for their lack of the civic spirit; the striking part which they play not only in the progressive legislation of every progressive country, but in the administration of that legislation, is sufficient refutation of the charge. They are, in fact, ministers of justice as well as servants of the law.—*The Law Journal.*

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The Loss of the 'Titanic.'—In the general sorrow caused by the appalling loss of life in the wreck of the 'Titanic,' no thought has yet been given to questions of legal liability. They must, however, eventually arise between the owners of the vessel and her passengers or their representatives, and a rough statement of the legal position may, therefore, not be without interest. At common law the contract of the carrier of passengers is to provide a vesse

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim, and Mr. Justice Phillips.

Nadarsa Rowthen .. Appellant *
(*Plaintiff*)

v.

Amirtham and others .. Respondents
(*Defendants.*)

Nadarsa Rowthen *v.* Amirtham.

Land Tenure—Kasavargam tenure, incidents of.

Held, accepting the findings of the District Judge arrived at on evidence taken in a case from the Tanjore District that the chief incidents of a kasavargam tenancy were :—

(*a*) The manaikat or site is the property of the mirasidars: the kasavargamdar has no proprietary interest in it; but he is ordinarily the proprietor of the superstructure built upon it.

(*b*) The kasavargamdar holds the manaikat free of rent, or for a more or less nominal rent, on condition that he performs services for the mirasidar as an artisan or otherwise as the case may be.

(*c*) The kasavargamdar has no right to transfer the manaikat to another but on his death it passes to his heirs on the same conditions as those on which he held it.

(*d*) The mirasidar is entitled to eject the kasavargamdar is forthwith' if the latter refuses to render him the customary service.

(*e*) If the kasavargamdar is ojected, the mirasidar is bound to compensate him for any house which he may have erected on the land during his tenancy and the kasavargamdar is not entitled to claim compensation for the first time in second appeal.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 893 of 1907, presented against the decree of the Court of the District Munsif of Mannargudi in O. S. No. 14 of 1907.

This second appeal coming on for hearing before Mr. Justice Wallis and Mr. Justice *Krishnaswami Aiyar*†

The Court delivered the following

JUDGMENT :—The District Judge is mistaken in supposing that if there was a tenancy from year to year it terminated on the death of Chidambaram. There is no finding in this case

* S. A. No. 53 of 1909. 4th September 1911.
† 21st July 1910.

Nadarsa Rowthen v. Amirtham.

as to the nature and the term of the tenancy, and the decisions to which we have been referred do not determine the incident of this tenure. These incidents must, we think, be determined on evidence as to the custom of the locality, and we have therefore decided to call for findings on the following issues:—

1. What are the incidents of *kasavargam* tenancy with special reference to the term of such tenancy?

2. Did the defendants Nos. 1 and 2 or their predecessors refuse to perform services in accordance with the terms of the tenancy?

3. Has the tenancy been determined, and, if so, how?

Fresh evidence may be taken of witnesses called by the parties and of such other witnesses as the District Judge may think fit to call.

In compliance with the order contained in the above judgment, the District Judge of Tanjore submitted the following

FINDINGd Ed:—The High Court has called for findings on the issues:—

(i) What are the incidents of *Kasavargam* tenancy with special reference to the term of the tenancy?

(ii) Did the defendants Nos. 1 and 2 or their predecessors refuse to perform services in accordance with the terms of the tenancy?

(iii) Has the tenancy been determined, and, if so, how?

2. *Issue I.*—The question raised by this issue is a large one, and one of some general importance throughout this district. The parties have therefore been afforded every reasonable facility for adducing all the available evidence, oral as well as documentary, on the point, and three large land-holders of the district have also been summoned and examined as witnesses for the court, and documents produced by them which have a bearing on the question have been filed as exhibits. There is therefore now on the record a considerable body of evidence from which to deduce a finding as to what are the more important general incidents of *kasavargam* tenancy: that is so far as the Tanjore district is concerned. The custom of kasavargam prevails in other districts as well (see the deposition of the first court witness) and the incidents of the

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tenancy may, and in all probability do, vary in different districts, but it is clear from the judgment of the High Court in which the findings are called for that it is only the custom as it obtains in this district that is to be taken into consideration, and it is on that footing that evidence has been let in at the hearing on remand.

3. The meaning of the term *kasavargam* or *kasavargamdar* is given in Wilson's Glossary (see page 583) as "traders and makers of canvas sacks, residing in a village, and claiming certain fees, and perquisites, having a proprietary right to their houses, but not to the ground on which they stand." The learned author does not appear to have been satisfied as to the etymology of the term, and it may therefore perhaps be presumed that his definition was based entirely on his own personal experience of the use of the term, or on the experience of other persons on whose information he considered it safe to rely. This may serve to explain why the definition which he adopted does not altogether apply to the term as used in this district. The latter portion of the definition alone seems to apply here. The oral evidence adduced in the present case shows that in this district, kasavargamdars have, as a rule, "a proprietary right to their houses, but not to the ground on which they stand." As regards this feature of *kasavargam* tenancy, there can, I think, be no doubt. It has been spoken to by several witnesses of large experience in the management of lands in this district, whose evidence appears to be thoroughly reliable. It is borne out by the entries in the paimash accounts, some of which have been filed as exhibits in this case (see exhibits Q, S and T) and it has been repeatedly recognised by the courts of the district, and by the High Court as one of the customary features of kasavargam tenancy as it prevails in this district; *Vide* Exhibits Z3, DD, GG, and HH, and the cases reported in I. L. R. 14 Madras 98, and 22 Madras 116. Exhibit EE may also be referred to. It is the decree in a case in which a mirasidar sued to recover a manaikat. The parties compromised, the defendant agreeing to vacate the manai on condition that the plaintiff should pay him compensation for the house he had erected on it. This was a kasavargam manaikat, and the terms of the compromise go to show that the parties recognised that the kasavargamdar had no proprietary right in the manaikat itself but only in the super structure which he had erected upon it. It is scarcely necessary to refer to any more evidence on the point, but mention may perhaps be made of Exhibits AA1 to AA8 and BB. Exhibits AA1 to AA8 are rent-deeds which the first court witness has now taken from the tenants of his kasavargam manaikats instead of any longer relying

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on custom alone for determining the conditions of their tenancy. Exhibit BB is a similar deed executed in favour of the mirasidar by the occupant of a kasavargam carpenter's manaikat, who is the descendant of the Kasavargamdar mentioned in the paimash account (Exhibit CC). (*Vide* the evidence of plaintiff's 14th witness). All these documents set forth the fact that the manaikat is the property of the mirasidar. This then may be taken to be the fundamental principle of the tenancy: the site is the property of the landlord: the superstructure that of the tenant.

4. The rest of Mr. Wilson's definition of the term *kasavargam* does not seem to be applicable to kasavargam tenancy as known in this district. None of the witnesses examined—not even the first court witness, Dewan Bahadur R. Raghunatha Rao, a gentleman of exceptionally wide experience of the land tenures of the district, seems to have ever come across a *kasavargamdar* who could be described as a trader and maker of canvas sacks, residing in a village and claiming certain fees and perquisites; and not a single one of the documents exhibited refers to a kasavargamdar to whom such a description would apply. It seems clear, therefore, that that part of the definition does not hold good in this district.

5. The next important point to be considered in connection with kasavargam tenancy as it is known in this district is the condition on which the kasavargamdar is allowed to occupy the manaikat of his mirasidar. There can, I think, be no doubt that in this district the condition ordinarily is that he should render service of some sort to his landlord, the mirasidar. When the kasavargamdar is an artisan, the services he renders are those incidental to his trade, *e. g.*, the barber does service as a barber, the washerman as washerman, the carpenter as carpenter, and so on. When the kasavargamdar is not an artisan, he renders services to his mirasidars by supplying manure from the manaikat for the mirasidar's land and also cocoanuts from the trees, if any, growing on the manaikat. He also usually renders cooly's service in various ways, *e. g.*, by running on small errands and assisting generally at the landlord's house on festival and other great occasions. The exact nature of the services to be rendered varies according to circumstances, but services of some kind or other are, as a rule, rendered by the occupant of the manaikat, the kasavargamdar. In return for these services, the kasavargamdar is allowed to occupy his manaikat free of rent, as a rule, though in some cases when the landlord does not require any services from the tenant, or when the services which h

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receives from him are not a sufficient return for the enjoyment of the manaikat, a money rent is imposed in lieu of, or in addition to, such services. If the kasavargambar renders constant and important services to the mirasidar, for which the free occupation of his manaikat would not be a sufficient return, he is sometimes given a maniam in some form or other as well, or sometimes he is paid a wage for his services, though at a lower rate than that usually prevailing in the village. The oral evidence let in on this point is clear, and is, I think, ample to establish the fact that in this district the condition on which the kasavargamdar ordinarily holds his manaikat is that he should render services in some form or other to his landlord, the mirasidar. The evidence of the first court witness, Dewan Bahadur R. Raghunatha Rao, by itself goes a long way towards proving this. This witness may almost be regarded as an expert witness on the subject. He is 80 years of age, and has had a wide and extended experience—both as a Government official and as a landed proprietor owning estate in five different taluks of the district, of the various kinds of tenancy prevailing in this district and his evidence in regard to the customary incidents of of kasavargam tenancy seems to me to be entitled to very great weight. It is corroborated by the evidence of the third court witness, another big mirasidar with estates in five different taluks, some of them in a village only four miles distant from the village in which the suit site lies. The evidence of the second court witness, another big mirasidar, is to the same effect, though it is not entitled to so much weight as the evidence of the other two court witnesses, since this witness has not the same extended personal experience of the matter. The eleventh witness for the plaintiff is another big mirasidar of the district whose evidence is entitled to considerable weight, and it is to the same effect. There is also the evidence of the 14th witness for plaintiff to the same effect. Moreover, this incident of kasavargam tenure has been already recognised both by the courts of the district and by the High Court. This may be seen by a reference to Exhibits R, DD, and HH, Z1, Z3 and JJ and the case reported in I. L. R. 27 Madras 519. The term 'kasavargam' is not expressly mentioned in the report of the last mentioned case, but the custom of the district which was therein found to be estabilished by which artisans are allowed to occupy manaikats in the village rent free so long as they render services, obviously refers to the custom known in the district as kasavargam. No doubt the finding of the Sub-Judge in that case seems to cover only instances in which the manaikat was a samudayam or village common land,

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and the tenant was expected to render service to all the villagers. The learned vakil who appeared for the defendants in the case now before me, contended that those were the only real cases of kasavargam tenancy, and that the term does not apply to cases where artisans, or other tenants, occupy a manaikat which belongs to a single mirasidar on condition of rendering him service of some kind. This contention, however, is quite inconsistent with the entries in the paimash accounts where kasavargam manaikats have been shown as belonging to idividual mirasidars (see Exhibits Q and T.) The oral evidence let in at the hearing of this case on remand also clearly establishes that individual mirasidars may and do own kasavargam manaikats and let them out to tenants on kasavargam tenure. Instances of this have also been frequently found by the courts of the district (See Exhibits R, DD, EE, FF, GG). There is scarcely any evidence to the contrary. The defendants' vakil relied on Exhibit IX, the judgment of the Subordinate Judge of Kumbakonam in a very recent case—Appeal No. 539 of 1909. In para. 3 of that judgment it is stated with reference to the term *kasavargam* that "it is admitted it ordinarily signifies a tenant-at-will occupying a common village site and not any particular private one." That may perhaps be taken to be an instance in which a mirasidar admitted that kasavargam tenancy ordinarily applied only in the case of samudayam manaikats. But the admission is not worth very much in the absence of any evidence to show whether the plaintiffs in the suit had any experience of kasavargam tenancies in general. It is clear from another portion of the same judgment (Exhibit IX) that the particular manaikat to which the plaintiffs were laying claim as their own property was a samudayam manaikat, belonging to all the mirasidars of that village. The plaintiff's title to the manaikat was therefore disproved, and as there is no evidence to show that he actually owns any kasavargam manaikats of his own, his admission in regard to such manaikats cannot count for very much, in face of all the evidence in the present case to the contrary effect. The learned vakil for the defendants also relies on Exhibit JJ to show that the rendering of services is not a necessary incident of kasavargam tenancy and that in fact there are no customary incidents of such tenure, but that the conditions of the tenancy vary in each parcular case according to circumstances. Exhibit JJ is a copy of the judgment of the District Munsif of Tanjore in O. S. No. 230 of 1894. That suit was brought by the head of the S. P. G. Mission at Tanjore to recover possession of some land which had been originally granted to the well-known Missionary Schwartz on behalf of the

S. P. G. Mission by the Rajahs of Tanjore. This land was measured as kasavargam land belonging to the Mission at the time of the Paimash (1829) and the District Munsif found that the defendants were kasavargam tenants of the Mission and liable to be ejected. In that case it appeared that the defendants neither rendered services, nor paid rent to the Mission and the defendants' vakil argues that this goes to show that the performance of services is not an essential incident of kasavargam tenancy. The inference does not not seem to be justified. A perusal of Exhibit JJ seems to show that it was understood in that case that a kasavargam tenant should render services to his landlord, but that mere cessation of such services would not suffice to determine the tenancy (see the case of *N. S. Narayanasamy Aiyar* v. *Vathiyar Rama Aiyar* reported in *Madras Weekly Notes* page 473). The case of the Tanjore Mission was moreover a peculiar one. The terms on which the Mission allows tenants to occupy its lands may be gathered from an extract from the will of Rev. J. C. Kohlhoff which is set out in para 9 of Exhibit LL, the judgment of this court in appeal from the judgment marked as Exhibit IX. These are quite different from the terms of the ordinary kasavargam tenancy, but nevertheless the Mission succeeded in evicting from their lands persons whose predecessors in title were proved by the paimash accounts to have been kasavargamdars but who had ceased for a long time to pay rent or render services to the Mission. The judgments in these cases (Exhibits JJ and LL) cannot, therefore, be regarded as evidence that the performance of services for their landlord is not an essential condition of a kasavargam tenancy. The learned vakil for the defendants also relied on the ruling referred to in 14 Madras Law Journal, Short Notes, page 18. There is, however, nothing in that report to show what were the facts of that case or in what district it arose. It may not have been a Tanjore case, and it is only with the incidents of kasavargam tenancy as they obtain in the Tanjore District that we are now dealing. In the circumstances it is impossible to apply that ruling to the present case. Looking to the whole of the evidence let in on this point, I think I am justified in finding that ordinarily the condition on which a kasavargamdar holds his manaikat is that he should perform services of some kind or other for his landlord the mirasidar, with or without the addition of a more or less nominal money rent.

6. The next question to be considered is whether the kasavargamdar has any right to transfer his holding. The evidence of the Court witnesses and of plaintiff's eleventh and fourteenth witnesses

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proves that he has no such right. No evidence has been placed before me that would prove the exercise of such a right by a kasavargamdar in any particular instance. Exhibits IV, V, VI, VII and VIII have been filed by the defendants to prove instances in which such a right has been exercised by a kasavargam tenant, but they are not sufficient for that purpose. Exhibit IV is an extract from the paimash account which shows that paimash No. 678 is a kasavargam manaikat. Exhibit V is an extract from the land register which shows that paimash No. 678 is included in Survey No. 167 A. Exh. VI is a sale-deed, dated 13-9-'05, by which Survey No. 167-A was conveyed to the defendant's 3rd witness, the vendors describing the land as their ancestral property. But there is no evidence to show that the vendors were not the mirasidars, to whom S. No. 167-A. belonged, and the evidence of plaintiff's first witness shows that the manaikat has been vacant for years, so that in any case it is clear the vendors were not kasavargam tenants occupying the manaikat under a mirasidar. The same criticism is sufficient to deprive Exhibit VII of any evidentiary value for the purposes of this case. Exhibit VII purports to be an hypothecation bond by which on 15-11-'96 the executants of Exhibit VI mortgaged the same manaikat to Shanmugam Pillai, the second witness for the plaintiff. It is not quite clear that the manaikat referred to in Exhibits VI and VII is the same. There is some difference in the boundaries given in the two deeds. If the manaikat referred to in Exhibit VII is not the one dealt with in Exhibit VI, then there is no evidence to show that the former is a kasavargam manaikat at all. But assuming that the same manaikat is referred to in both documents, the evidence of plaintiff's 1st witness shows that it was vacant at the time when these deeds were executed and therefore it was not as tenants, but as mirasidars that the executants of Exhibits VI and VII purported to deal with them. There is no evidence that these persons were the descendants of the original kasavargamdars, but even if they were, it is quite possible that they or some of their predecessors had at some time acquired the mirasi rights in the manaikat by purchase from the original owner. Exhibits VI and VII are therefore of no value as evidence in the present case. So also in regard to Exhibit VIII which is a registration copy of a sale deed by which another manaikat was transferred. Exhibit VIII does not give the paimash number of the manaikat that was sold, but only the survey number which is 165-A. Exhibit V shows that survey No. 165-A. comprises about 40 paimash numbers only some of which are kasavargam manaikats It cannot therefore

be assumed that the manaikat conveyed by Exhibit VIII was a kasavargam manaikat, and in the absence of any evidence on that point, Exhibit VIII is altogether irrelevant to the question at issue. There is thus no evidence to rebut the evidence of the plaintiff's witnesses and the court witnesses to the effect that a kasavargamdar has no right to sell or mortgage his manaikat, not even subject to the condition that his transferee should render the customary services to the landlord. The holding, however, passes by inheritance to the heirs of the kasavargamdar, and they are entitled to continue in possession of it, so long as they render the customary services. Even if the heirs of a deceased kasavargamdar are females who are not themselves capable of rendering the necessary service in person, they are allowed to continue in the occupation of the manaikat as long as they make some arrangement for the performance of the services by others. This is established by the evidence of the court witnesses and of the 11th and 14th witnesses for the plaintiff, which is corroborated by entries in paimash accounts. See, in particular, Exhibits T, Y and KK. This incident of kasavargam tenancy has also been frequently recognised by the courts (see Exhibits R, DD, JJ and HH). There is no evidence to the contrary. I therefore find that it is an incident of *kasavargam* tenancy that the holding cannot be transferred by sale or mortgage, but that it passes by inheritance to the heirs of a deceased kasavargamdar. This incident is sufficient to distinguish the kasavargamdar from a mere licensee as the second defendant was held to be in the case reported in I. L. R. 16 Madras 97.

7. The next incident of the tenancy which is established by the evidence is the right of the mirasidar to eject the kasavargamdar, if the latter refuses to perform the customary services. This is abundantly established both by the oral evidence let in at the hearing on remand (see the evidence of plaintiff's 11th and 14th witnesses, and of the court witnesses) and by the exhibits which have been filed to show instances in which the right has been successfully claimed in the civil courts, see Exhibits DD, FF, GG, JJ and HH which are all judgments in suits the subject-matter of which was a kasavargam manaikat. It is unnecessary to go into the facts of all these cases in detail here. It is sufficient for the present purposes to say that they are all instances in which the courts upheld the rights of a mirasidar to eject from his manaikat a kasavargamdar who refused to render him the services which constituted the condition on which the manaikat was held. The oral evidence shows that it is usual when a kasavargamdar refuses to perform the

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customary service, to tell him to quit and that he generally vacates the manaikat wihout compelling the mirasidars to bring a suit to eject him. I therefore find that it is another incident of kasavargam tenancy that on the tenant refusing to render service to his landlord as usual, the latter is entitled to eject him forthwith.

8. Another incident of kasavargam tenancy is that if the landlord ejects the kasavargamdar for refusal to render services, he is bound to compensate him for any houses which the latter may have built on the site. There is abundant documentary evidence to prove that this has always been recognised by the courts of the district as an incident of the tenancy; see Exhibit DD (para 10), EE, HH (para 10) and JJ (para 28). This incident of the tenancy has also been recognised already by the High Court. (See the case reported in I. L. R. 22 M. 117).

9. I think I have now dealt with all the principal incidents of kasavargam tenancy, so far as they can be gathered from the evidence on the record. My finding on issue No. 1 is that the chief incidents of as kasavargam tenancy are as follows:—

(*a*) the manaikat or site is the property of the mirasidars: the kasavargamdar has no proprietary interest in it; but he is ordinarily the proprietor of the superstructure built upon it.

(*b*) the kasavargamdar holds the manaikat free of rent or for a more or less nominal rent, on condition that he performs services for the mirasidars as an artisan or otherwise, as the case may be.

(*c*) the kasavargamdar has no right to transfer the manaikat to another, but on his death it passes to his heirs on the same conditions as those on which he held it.

(*d*) the mirasidar is entitled to eject the kasavargamdar forthwith, if the latter refuses to render him the customary services.

(*e*) if the kasavargamdar is ejected, the mirasidar is bound to compensate him for any house which he may have erected on the land during his tenancy.

10. *Issue II.*—The plaintiff himself was his own 8th witness. At the re-hearing on remand he was recalled and deposed that he bought the suit manaikat in 1897, the tenant at the time of his purchase being Aiyasami Nadan; that Aiyasami Nadan rendered

him services up till his death; that after Aiyasamy Nadan died, he (plaintiff) called upon the defendants, who are Aiyasami's heirs, and in occupation of the manaikat, to render him service, and that they refused, and that he then told them they must vacate the manaikat. This is practically the case that was set up by the plaintiff at the outset in his plaint. There is no other evidence on the point. The defendants have not seen fit to go into the witness box to contradict the plaintiff's allegation to the effect that they refused to render him service about two years before the suit was brought to eject them. In these circumstances, I think the plaintiff's evidence on the point must be accepted. It is not denied that Aiyasami died about 2 or 3 years before the date of the plaint. The plaintiff says that it was 5 or 6 months after Aiyasami's death that he called upon the defendants to render him services and they refused. I therefore find on issue II that the defendants refused to render services to the plaintiff about two years before the institution of the present suit.

11. *Issue III.*—The plaintiff's evidence shows that the defendants refused to perform service about two years before suit (see my finding on issue II) and that he thereupon ordered them to vacate the manaikat. In accordance with my finding on issue I, I must hold that this determined the tenancy (*cf.* the case of N. S. Narayanasami Aiyar *v.* Vathiar Rama Aiyar reported in Madras Weekly Notes 473). My finding on issue III therefore is that the tenancy was determined, about two years before the institution of the plaintiff's suit, by the defendant's refusal to render him service, and his order to them to vacate the suit manaikat.

This second appeal coming on for final hearing after return of the finding of the lower appellate court, the court delivered the following

JUDGMENT:—The learned Judge's findings on the issues sent down for enquiry are not open to any legal objection and must be accepted. Mr. Ramachandra Aiyar on behalf of the tenants asks for compensation for the superstructure put up by his clients. The District Munsif had directed that the superstructure might be removed by the defendants and the defendants did not object to that portion of the decree in their appeal to the District Court. We do not think the defendants are entitled to claim compensation at this stage. The result is that the appeal is allowed, the judgment of the District Judge is reversed, and that of the District Munsif, restored. The respondents must pay the appellant's costs in this and in the lower appellate court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Hanumanthaiyan .. Appellant*
v. (9*th Defendant*).
Meenatchi Naidu & another .. Respondents
(*Plaintiff & 2nd to 8th and 10th* (*Defendants.*)

Hanumanthaiyan *v.* Meenatchi Naidu.

Mortgage—Subrogation—Essentials of—Entire extinguishment of discharged mortgage necessary.

To entitle a person advancing money for the discharge of a prior mortgage to claim the right of subrogation, it must be shown that the first mortgage has been extinguished.

Second appeal from the decree of the Additional Subordinate Judge's Court of Madura in A. S. No. 401 of 1908, presented against the decree of the Court of the District Munsif of Madura in O. S. No. 549 of 1906.

K. N. Aiya Aiyar for appellant :—The money coming from the third mortgagee has gone in partial discharge of the mortgage of the 1st. There is no reason why he should not claim priority to the extent of the discharge. The priority is not claimed against the mortgage partially discharged but only against an intermediate incumbrancer. He cited *Rupabai* v. *Audimulam*[1] ; *Gangadhara* v. *Sivarama*[2] ; *Seetharama* v. *Venkatakrishna*[3] ; *Govindaswami Tevan* v. *Doraiswami Pillai*[4]; *Phulamani Chandrain* v. *Nageshar Prasad*[5] *Gokuldas Gopaldas* v. *Puranmal Premsukh Das*[6] ; and COOTE *Mortgages*, p. 1468.

C. V. Ananthakrishnier, for respondents, submitted that subrogation can arise only on full discharge of the 1st mortgage. There having been only partial discharge, the appellant is not entitled to plead the right of the 1st mortgage. The contrary view must give him a right to claim equality with the 1st mortgagee himself. He relied upon the observations of *Mookerjee* J. in *Seetharama* v. *Venkatakrishna* ;[7] GHOSE on

* S. A. No. 625 of 1909. † 11th September 1911.

1. (1887) I. L. R. 11 M. 345 at 353.
2. (1884) I. L. R. 8 M. 246.
3. (1891) I. L. R. 16 M. 94.
4. (1910) 20 M.L.J. 380.
5. (1911) 8 A.L.J. 155.
6. (1884) I.L.R. 10 C. 1035(P.C.)
7. (1907) I.L.R. 36 C.193 at 219

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Mortgages, p. 332; JONES on Mortgages, Ss. 876 and 885; SHELDON on *Subrogation*, pp. 23, 26, 31.

This second appeal coming on for hearing before the Honourable Mr. Justice Munro and the Honourable Mr. Justice Krishnaswami Aiyar, their Lordships made the following

ORDER*:—Before deciding the appeal we must ask the District Judge to find on the evidence on record how much of the money borrowed under exhibits VIII and IX went towards the discharge of the mortgage under Exhibit I.

The finding should be submitted within 6 weeks and seven days will be allowed for filing objections

In compliance with the above order the District Judge of Madura submitted a finding that Rs. 100 advanced under Exhibit IX went towards the discharge Exhibit I. This second appeal coming on for final hearing the Court delivered the following

JUDGMENT:—In this case there are two questions raised before us:—(1) where there are two mortgages on a property and a person advances money for the payment of the first mortgage and that debt is satisfied, would the lender be entitled to stand in the shoes of the first mortgagee and claim priority if he had no interest in the mortgaged property either as purchaser of the equity of redemption or as mortgagee at the time of the advance, and (2) whether it is necessary that the first mortgage should be entirely discharged before the claim to priority over the 2nd mortgagee can be sustained. In this case only a portion of the mortgage money due under the first mortgage was paid and the first mortgage was not entirely discharged. We think there can be no doubt on principle that before a person advancing money for the purpose of discharging the debt due under the first mortgage can establish his claim to the rights of the first mortgagee it must be shown that the first mortgage had been extinguished. Otherwise the result would be that a number of persons would be entitled to rank as first incumbrancers with reference to different sums of money advanced by them, and it would be impossible to work out the rights of the parties. This is very clearly pointed out in *Gurdeo Singh* v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rashbehary Singh*[1]; and

1. (1907) 5 C. L. J. 611 at p. 633.

* 15th September 1910.

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in JONES on *Mortgages*, para. 885 *b*. The learned vakil for the appellant has relied on several rulings of this court for the contrary position. The cases relied on are *Rupabai* v. *Audimulam*[1], *Gangadhara* v. *Sivarama*[2] and *Seetharama* v. *Venkatakrishnier*[3]. In *Rupabai* v. *Audimulam*[1], the learned Judges state, at p. 354, that the whole of the prior charge was released and the same appears to have been the case in *Gangadhara* v. *Sivarama*[2]. The facts of *Seetharama* v. *Venkatakrishna*[3], so far as they appear from the report, are not very clear, but supposing that the case is authority for the proposition contended for by the appellant it would seem that the question was not properly discussed before the learned Judges and they give no reasons in support of their view. On this point therefore the appeal fails even if the other proposition advanced on behalf of the appellant be held to be sound, as to which we do not express any decided opinion. The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—Mr. Justice Abdur Rahim and Mr. Justice Phillips.

Subba Naidu *alias* Subbarayulu Naidu..	Appellant* (*Plaintiff*)
v.	
Ethirajammal and others ..	Respondents (*Defendants Nos.* 9, 5 *and* 6).

Subba Naidu v. Ethirajammal.

Limitation Act, Art. 85—*Accounts, mutual, open and current—Essentials of mutuality—C. P. C., O.* 41, *R.* 27, *Cl.* (*b*)—"*Any other substantial cause,*" *meaning of—Record of reasons.*

Per *Abdur Rahim* J. (*Phillips* J. *contra*).—The essential requisite of Article 85 of the Limitation Act is that there should be reciprocal demands. It is not sufficient, to bring a case within the article, that there is an open and current account or that the entries shew debit and credit.

Per *Phillips* J.—The mere fact that the balance was always in favor of one party is not conclusive proof against the accounts' mutuality for it is sufficient that there is reciprocal dealings. [*Velu Pillai* v. *Ghouse Mahomed* 4 referred to.]

Per *Abdur Rahim* J.—The expression "any other substantial cause" in O. 41, R. 27, Cl. (*b*), is not to be understood in a wide and unrestricted sense but should be understood as referring to the same class of cases as the one

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* S. A. No. 1461 of 1909. 16th October, 1911.

1. (1887) I. L. R. 11 M. 345.
2. (1884) I. L. R. 8 M. 246.
3. (1891) I. L. R. 16 M. 94.
4. (1893) I.L.R. 17 M. 293.

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specifically named. It would not cover a case where the evidence on record suggests to the appellate court a certain plea which one of the parties might have relied on, but did not, and it proceeded to take additional evidence in support of that view.

Per *Phillips* J.—The appellate court would be justified in thinking that absence of a document which would confirm or rebut the oral evidence is such an inherent lacuna in the evidence as would justify its admission in appeal in order to decide a very material question which has not been decided in the lower court.

Where the reasons for the admission of further evidence are apparent in the judgment: *Held* that the requirements of the law under O. 41, R. 27, Cl. (2), had been sufficiently complied with.

Oral evidence of the dealings between the parties in a case had been given in the first court. The plea was not raised before the first court that the account was a mutual, open and current account; but when it was first raised before the first appellate court the District Judge thought that the evidence already on record shewed that the defendants' claim was a running account and admitted the account books as additional evidence in support of the plea.

Held per *Abdur Rahim* J. (*Phillips* J. *contra*) that the appellate court's action was not justified by Order 41, R. 27, C.P.C.

Second appeal from the decree of the District Court of Madura in Appeal No. 161 of 1909, presented against the decree of the Court of the Additional District Munsif of Madura in O. S. No. 35 of 1908.

Suit by a minor to set aside a sale executed by his guardians on the ground of want of consideration. The first court held that all the items of debt, except one, which were said to be the consideration were barred by limitation and that the deed should be set aside on the plaintiff paying Rs. 50 which alone was found to have been for discharging a debt really due from the minor's estate. On appeal the District Judge admitted fresh evidence enabling the defendant to adduce new grounds to show that the sale was binding on the plaintiffs and he then dismissed the suit. The plaintiff appealed.

K. Jaganada Aiyar for appellant.

K. V. Krishnaswami Aiyar and *P. R. Narayanaswami Aiyar* for respondent.

K. Jaganada Aiyar:—A guardian has no power to revive barred debts. The District Judge had no power to admit fresh

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evidence on appeal when no evidence was excluded in the first Court—O. 41, R. 27, C. P. C.; *Kessowji Issur* v. *G. I. P. Ry. Co*[1]. No reason is given for admitting the new evidence.

K. V. Krishnaswami Aiyar :—In this case the items are not barred by limitation for there is an account stated between the parties, signed by the defendant—Art. 64. The mortgage deed states the items as due. [*Abdur Rahim* J.—But the account stated is in t e very mortgage sought to be set aside. *Hargopal* v. *Abdul* and *Manjunatha* v. *Devamma*[3] show that cross demands are not necessary for the accounts to be mutual; Art. 120 would be the proper article. Evidence is that the amounts were advanced for the necessaries of life; under S. 68 of the Contract Act, he would be bound to repay them. It is not money lent. It is articles supplied; so Art. 120 is applicable. [It is a statutory liability imposed on the estate of the minor—*Secretary of State* v. *Abdul Bari*[4]; SHEPHARD and CUNNINGHAM'S *Contract Act*, Introduction, p. 37. My contract was with the guardian and the guardian himself could pay out of his pocket, and as the guardian can reimburse himself after the minority is over and I can stand in his shoes, this is a right of subrogation—*Bridge* v. *Madden*[5]; *Bagoh Pneumatic Tyre Co.* v. *Clipper Pneumatic Tyre Co.*[6] This is not a case in which the mortgagee is suing to enforce the mortgage; he is only a defendant. Under S. 41 of the Specific Relief Act the minor is bound to refund—*Lakshmi Doss* v. *Roop Lal*[7]. I am a *de facto* guardian and I am entitled to the same rights as a guardian—*Kasim Saiba* v. *Sudhinda Thirtha Savni*.[8] Statement of the reason is not a condition precedent for admitting new evidence on appeal—*Gopal Singh* v. *Jakhri Rai* . If evidence is not objected to in the first court then the objection cannot be raised in a higher court—*Jaganath Pershad* v. *Hanuman Pershad*[10]. There is evidence that the 3rd guardian concurred in the alienation. By limitation not being raised as an issue I am deprived of the opportunity of proving acknowledgments which

1. (1907) I.L.R. 31 B. 381, 390 (P.C.)
2. (1872) 9 B. H. C. R. 429.
3. (1902) I.L.R. 26 M. 186.
4. (1892) I.L.R. 20 C. at 57 (F.B.)
5. (1904) I.L.R. 31 C. 1084.
6. (1901) 1 Ch. 199.
7. (1906) I.L.R. 30 M. 169.
8. (1895) I.L.R. 18 M. 359.
9. (1885) I.L.R. 12 C. 37
10. (1909) I.L.R. 36 C. 833 (P.C.)

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are proved to have been in existence.

K. Jaganatha Aiyar in reply:—Apart from the mortgage there must be an account for Art. 64. Here there is none. Art. 120 will not apply as some of the debts were incurred by minor's father. Article 61 applies.

The Court delivered the following

JUDGMENT :—*Abdur Rahim* J. :—In my opinion the judgment of the learned District Judge must be reversed and he should be asked to re-hear the appeal. The appeal was filed in a suit instituted by the appellant, a minor, through his next friend, to obtain a declaration that a deed of usufructuary mortgage (Exhibit IX), executed in favour of the first defendant on the 26th April 1902 with respect to certain property belonging to the plaintiff, by defendants Nos. 2 and 5, two of his guardians appointed by the District Judge of Madura, is not binding on him, and for recovery of possession of the property. The mortgage was executed without the sanction of the court and it has been held that it does not bind the appellant. But the District Munsif found that of the amount of Rs. 1,179-6-4, for which Exhibit IX was executed, the appellant was liable only for Rs. 147-12-0, while the District Judge, relying on further evidence admitted by him during the hearing of the appeal, has held that the minor is liable for the entire amount of the bond, that is, Rs. 1,179-6-4. The amount for which the bond was executed consists of a number of items set out in the Distrct Munsif's judgment in paragraph No. 14, beginning with the life-time of the plaintiff's father, whose death took place in September 1895, down to the date of the bond, *i. e.*, a period of about seven years. It appears that the first defendant, who is the eldest son-in-law of the plaintiff's father, spent various sums on behalf of the family from time to time, and the first defendant's case is that he thus spent out of his pocket altogether about Rs. 1,432, out of which he received Rs. 400 in the shape of rents collected by him from the plaintiff's property, and it was for the balance of Rs. 1,032 plus Rs. 50 and Rs. 100, advanced on other accounts, that Exhibit IX was executed. The District Munsif found that some of the items were advanced more than three years before the date of Exhibit IX and were thus barred. As regards one large item, *i. e.*, of Rs. 740, spent by the first defendant for the maintenance of the plaintiff's step-mother,

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the plaintiff and his sister, for the education of the plaintiff and on certain family ceremonies during the course of seven years, it did not appear in evidence how much was spent within three years of Exhibit IX and how much prior therto. He then strikes the average for each year and disallows the amount so calculated for the period beyond three years. This mode of dealing with item No. VIII has been objected to on behalf of the appellant but I do not wish to express any decided opinion on the point, as the appeal, in my opinion, ought to be re-heard, and it will then be open to the District Judge to dispose of the question on the evidence.

The District Judge holds that there was an open and current account between the first defendant and the plaintiff's father and guardian, as evidenced by Exhibit XXIII series, and therefore none of the items are barred. In the first place his finding on this point, if it is a valid finding, would not bring the case within Article No. 85. That Article deals with cases of mutual, open and current accounts where there have been reciprocal demands between the parties. It is not sufficient to bring a case within the purview of this Article that there is an open and current account or that the entries show debit and credit. Suppose one person advances money to another and the latter pays him sums of money from time to time towards the discharge of the debt, that would not be a case within Article No. 85. The essential requisite of this Article is that there should be reciprocal demands.

In the next place, it was not the case of the first defendant, as is to be gathered from his written statement, the issues, the District Munsif's judgment and even the grounds of appeal to the District Judge, that there was a mutual, open and current account between him and the plaintiff's father as his guardian. Apparently it was during the hearing of the appeal that it suggested itself to the District Judge, or was argued before him, that the account kept by the first defendant was of such a nature. The plaintiff was, under these circumstances, entitled to complain that he was taken by surprise.

The next question is, does the Judge's action come within the powers conferred by Order XLI, Rule 27, which substantially is in the same terms as S. 568 of the old Code? He apparently

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did not record any reasons at the time he admitted the additional evidence, and what is to be gathered from his judgment is this: he thought that the evidence already on record for the defence showed that the defendant's claim was on a running account; the account kept by the first defendant was handed over to the fifth defendant but it was not filed in the course of trial. The fifth defendant happened to be present at the hearing of the appeal, and so the District Judge examined him as a supplemental witness (court's first witness, as he is described). The accounts were produced, and the witness having sworn that they are in the handwriting of the first defendant, the Judge, being satisfied from an inspection of the accounts that they were regularly kept in the ordinary course of business, admitted them in evidence. The evidence was clearly not admitted on the ground stated in clause *(a)* of Rule 27, that is, because of the court of trial having refused to admit such evidence. Was this then a proper case under clause *(b)*? It could not be said that the appellate court required the additional evidence to enable it to pronounce judgment. If the evidence already on record made out that it was a case of mutual, open and current account within the meaning of Article 85, there could have been no necessity for admitting the additional evidence and, if not, the party who had to make out the plea and failed to do so in the court of first instance must suffer judgment against him on that point. But I fail to see how the accounts in question were needed to enable the appellate court to pronounce judgment. Then, does this come within the scope of 'any other substantial cause,' mentioned in clause *(b)*? 'Any other substantial cause' is apparently not to be understood in a wide and unrestricted sense but as referring to the same class of cases as the one specifically named. That is how I understand the interpretation placed on the section by the Privy Council in *Kessowji Issur* v. *G. I. P. Railway Company*[1], where their Lordships lay down that the legitimate occasion for S. 568 (of the old Code) is where, on looking into he evidence as it stands, some inherent lacuna or defect becomes evident. This reading of the section would not, in my opinion, cover a case where the evidence on record suggests to the appellate court a certain plea

1. (1907) I.L.R. 31 B. 381 at p. 390.

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which one of the parties might have relied on but did not, and it proceeds to take additional evidence in support of that view. And this is what happened in this case.

Having made up his mind to take additional evidence, the District Judge admits the accounts produced by the fifth defendant, merely on his proving that they were made over to him by the first defendant and are in the handwriting of the first defendant. There was no evidence that they were kept in the ordinary course of business, but the Judge infers that they were so kept from an inspection of the accounts. He limited the cross-examination of the witness examined in connection with the accounts by the pleader for the plaintiff to matters relating to the proper custody of the accounts and to the question whether they were kept back in the court of first instance. The plaintiffs were not allowed to show that the accounts were not kept in the ordinary course of business or to prove facts which would negative the inference that there was a mutual, open and current account between the parties or to impeach the correctness of the entries. It might be that, so far as the items admitted by the plaintiffs in the first court to be correct are concerned, it was not open to the plaintiffs to impeach them, but they would be entitled at least to show that the other entries which would make out a case of mutual, open and current account were not correct.

It is clear from the proceedings that the plaintiff objected to the admissibility of the accounts, though there is no note to that effect and it was not suggested during argument before us that the plaintiffs did not object to the taking of additional evidence.

In my opinion, the procedure of the appellate judge was wholly unwarranted by law and I would therefore reverse his judgment and direct him to re-hear the appeal and dispose of it according to law. The cost of this appeal will abide the result.

I may mention that the learned pleader for the respondent also tried to support the decree of the lower appellate court on grounds other than those relied on by that court. It will be open to the respondent to urge those grounds before the District Judge, who, in dealing with the case on the facts as may be found by him, will be in a position to dispose of such grounds in a satisfactory manner.

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My learned brother would confirm the judgment of the lower appellate court. The second appeal is dismissed under S. 98, C. P. C., with costs. The time for redemption is extended by three months from this date.

Phillips J. :—The chief ground of appeal is that the District Judge was wrong in admitting additional evidence at the hearing of the appeal, and a further objection is taken, that he refused to allow cross-examination of the witness examined by him. The District Munsif found that a large portion of the consideration for the plaint bond was time-barred at the date of execution, and that therefore the minor could not be bound by the action of his guardians in admitting liability, although no issue on the point had been raised. Oral evidence of the dealings between the parties had been given in the lower court, but the accounts were not filed, although the fifth defendant had been summoned to produce them. On the oral evidence there is undoubtedly some ground for supposing that the account between the parties was a mutual, open and current account, but the question was not raised before the District Munsif, apparently because there had been no plea of limitation. Accordingly, when the plea was raised before the District Judge, I think that he was justified in thinking that the absence of a document, which would confirm or rebut the oral evidence was such an inherent lacuna in the evidence as would justify its admission in appeal, in order to decide a very material question which had not been decided in the lower court. In fact it would appear that on the evidence before him the District Munsif had not sufficient material for a finding that some of the items were barred by limitation, and this is shown by the unsatisfactory method adopted by him to decide what amount was so barred. It might be contended that the first defendant should have insisted on the production of the account in the court of first instance, but in that court its production seemed to be unnecessary, as the plaintiff had not pleaded that some of the items in the account were barred by limitation. I am, therefore, not prepared to say that there was not substantial cause for the production of the document, such as would justify the District Judge in admitting it under Order XLI, Rule 27.

As regards the further plea that the fifth defendant as court witness was not allowed to be cross-examined, I see from the

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District Judge's note that cross-examination as to the genuineness and custody of Exhibit XXII (the account filed in appeal) was not shut out, but only cross-examination as to the correctness of the details in the account. As the fifth defendant had not kept the accounts, he could hardly be expected to verify the details. In fact, in arguing this second appeal, the only objection taken was that the plaintiff had no opportunity to disprove the guineness of the account. It does not appear that he wanted to adduce additional evidence on the point, and he was allowed to cross-examine the court witness as to the genuineness. I cannot therefore say that the District Judge's procedure was irregular or prejudicial to the interests of the parties. The District Judge has omitted to separately record his reasons for admitting further evidence, but the reasons are apparent in his judgment and that would appear to be sufficient record to meet the requirements of the law.

As regards the question whether Exhibits XXII and XXII-A. do or do not constitute a mutual, open and current account, with all due deference, I am unable to concur in my learned brother's opinion. The fact that the expenditure is shown in one account and the receipts in a separate account does not, in my opinion, alter the nature of the account, for in the former account the transactions in the latter have been periodically brought to account and a balance struck. The receipts are mostly on account of rent, for which the first defendant had to account to the minor and the expenditure consisted of various items spent for the maintenance and education of the minor and his family. The minor could at any time demand the rent due to him, and similarly the first defendant could demand repayment of the sums spent by him. In fact the minor's claim to some of the rent was as much barred by time as the first defendant's claim against the minor, but this did not prevent the parties from taking into account all the items on both sides when striking a balance. The mere fact that the balance was always in favour of the first defendant is not conclusive proof against its mutuality, for it is sufficient that there should be reciprocal dealings—*Velu Pillai* v. *Ghose Mahamed* [1]. In the present case, it does not appear that the rent received by the first defendant was so

1. (1893) I.L.R 17 M. 293.

received merely in partial discharge of the monies lent by him, but the first defendant was bound to account for the rent, if called upon to do so. This is, I think, apparent from the fact that the rent account is kept separately. It might be argued that the two sets of dealings are altogether independent transactions, but the fact that the respective debits and credits have been balanced against each other destroys the value of this argument. I think, therefore, that the District Judge was right in treating these accounts as a mutual, open and current account within the meaning of Article No. 85 of the Limitation Act, and in holding that there was no bar of limitation.

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I would, therefore, dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Karumathil Puthiaveettil Kalliani Amma	.. Appellant* (*2nd Defendant*)
v.	
Karumathil Puthiaveettil Govinda Menon and others	.. Respondents & Appt. in *S. A.* 526 *of* 10. (*Plff.* & *Defts.* 1 & 3 *to* 23).

Malabar Law — Marumakkathayam law—Gift to a woman and her children—Estate taken—Karnavan's powers over the property so given—Status of donees—Building by one on parcel of land—Demolition—Compensation—Bona fide.

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According to the Marumakkathayam law, property is held by the members of a Tarwad jointly without any right to compulsory partition and without any individual right of disposal so long as the Tarwad continues to exist. Property gifted to a woman and her children is, when the donees are governed by the Marumakkathayam law, taken with the above mentioned incidents [*Soorjeemoney Dossee* v. *Deenobundoo Mullik*[1] and *Shurusool* v. *Shawukram*[2] referred to] and the issue of the donees become entitled on birth to the property equally with the donees. [*Katunkandikoma* v. *Sivasankaran*[3] referred to] and none of the persons taking under the gift has any right of disposal of his or her interest contrary to the Marumak-

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* S. A. Nos. 525 and 526 of 1910. 20th September, 1911.

1. (1857) 6 M.I.A. 526.
2. (1876) 2 I. A. 7.
3. (1893) 20 M. L. J. 134.

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kathayam law. [*Pattatheruvath Pathumma* v. *Mannamkunniyil Abdul*[1] referred to.] The members do not become a Tarwad so as to give the Karnavan all the ordinary rights of a Karnavan over the members of his branch. The Manager's right is confined to the management of the special property owned by him and the other members of his branch [*Koroth Amman Kutti* v *P. Appu Nambiar*[2] explained] but the donees do form a Tarwad in so far that the members who are born in the branch acquire a right in the property by birth.

A Karnavan ordinarily cannot create a Kanom for such a long period as sixty years in the absence, especially, of a special benefit such as would justify the same; nor can it be upheld even for the usual period of 12 years.

The members of a Marumakkathayam Tarwad are not tenants in common in the sense in which the term is used either in the English law or in the Dayabhagha School of law. No junior member can take possession of any particular portion of the family estate he might choose and erect buildings on it and continue in occupation of it; and if a junior member does take possession of any portion and builds on it he cannot resist recovery or demolition of the building on general principles.

It is not open to a person who builds on land belonging to another to raise the plea of *bona fide* building, if he had been put upon enquiry as to his real title, and if he put a wrong construction on a deed of gift on which the plea of *bona fide* is sought and maintained, he must take the consequence.

Second appeals from the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. Nos. 313 and 406 of 1909, respectively, presented against the decree of the Court of the Principal District Munsif of Calicut in O. S. No. 213 of 1908.

T. R. Ramachandra Aiyar for appellant.

C. V. Anantakrishna Aiyar for respondent.

The Court delivered the following

JUDGMENT:—These two second appeals arise out of a suit by the plaintiff to recover a paramba demised by the 2nd defendant in favour of the 1st defendant. The parties to the suit are all members of a Marumakkathayam Tarwad. The plaintiff, 1st defendant, and defendants Nos. 3 to 6 are the children of the 2nd defendant who is the senior lady of the Tarwad. The other defendants are the children and grand-children of the 2nd defendant's children. The plaintiff is the senior male member and according to the Marumakkathayam law the Karnavan of the Tarwad. Until about a year before the date of the suit the 2nd defendant was in actual management of the Tarwad. But in April 1907 she gave up the management to the plaintiff under Exhibit I. Prior to her doing so she executed in April 1906 a kanom-deed, (Exhibit T), demising the paramba in question in favour of a

1. (1907) I. L. R. 31 M. 228. 2. (1906) I. L. R. 29 M. 322.

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junior son, the 1st defendant, for a period of sixty years. The demise purports to be made expressly for the purpose of enabling the 1st defendant to erect a house on the property and entitle him to receive at the expiry of the kanom the value of the house as well as compensation for other improvements that he might make. The plaintiff impeaches the demise as an improvident transaction which the 2nd defendant as manager has no power to make, and claims to recover the premises and to have the building erected by the 1st defendant pulled down and removed, and states that he is not bound to pay any compensation for the building. The 1st and 2nd defendants contend that the property in suit belongs to the 2nd defendant alone, that the other members of the Tarwad have no title to it during her life, and that the demise by her in favour of the 1st defendant is valid. The 1st defendant claims in case of eviction to be entitled to compensation for the value of the building. The property in dispute together with a large number of other items of property was the subject of a deed of gift executed in 1857 in favour of the 2nd defendant's mother, Ammu Amma, by her husband one K. Govinda Menon, and it is on the construction of this instrument that the 1st and 2nd defendants contend that the 2nd defendant is exclusively entitled to the property during her lifetime. Both the lower courts have negatived this contention and held that the properties included in the deed of gift, (Exhibit A), were taken by Ammu Amma to be held and enjoyed by her with the incidents of Tarwad property under the Marumakkathayam law, and that consequently they belonged to Ammu Amma and her children and the issue of her female children, with the result that the plaintiff and the defendants, other than the 2nd defendant, were equally entitled to them along with the 2nd defendant. The lower courts have further held that the demise in question was beyond the powers of disposition of the 2nd defendant, and that the 1st defendant was bound to surrender the property. The District Munsif was of opinion, however, that the 1st defendant was entitled to receive compensation for the building. But the Subordinate judge held he was not. It would appear that the plaintiff, after the institution of the suit, applied for an *ad interim* injunction restraining the 1st defendant from erecting the

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building. But the application was not granted as the 1st defendant had already made some advance in the building of the house. The 2nd defendant has preferred S. A. No. 525 and the 1st defendant S. A. No. 526 aginst the judgment of the Subordinate judge.

The contentions urged by the learned Vakil for the appellants are :—

(i) that on the correct construction of Exhibit A the 2nd defendant alone has a present title to the property in dispute ;

(ii) that even if the property belongs to the whole Tarwad the demise is not invalid ;

(iii) that even if the demise should be held not binding on the Tarwad on the ground that it is for the excessive period of 60 years, it should not be altogether set aside, but upheld for the period for which a Karnavan could lawfully grant a demise of the character of Exhibit T ; and

(iv) that, if the demise be not upheld at all, the 2nd defendant, being a co-owner of the property with the plaintiff, did not act wrongfully in constructing the building, and the plaintiff is not entitled to have it demolished, and that 1st defendant is entitled to compensation on eviction.

These contentions will now be dealt with *seriatim*.

With respect to the first contention relating to the construction of Exhibit A, the material terms of the instrument which, as already stated, is a deed of gift executed by K. Govinda Menon infavour of Ammu Amma are:—"I have now given properties "consisting among others of land, paramba, and house, parti- "culars whereof are given bellow * * * In all, "properties to the value of Rs. 10,000 are as aforesaid given to "you as yours, and I have delivered the documents, etc., relating "thereto, and now in my possession. Therefore I have resolved "that, acting in accordance with the terms and conditions "thereof, you and your Santhanams should be in enjoyment for "ever, along with me at the said Puthiaveedu as long as I live "and *in proprium* thereafter." The document recites that the donor

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had already given some properties to the donee and her Santhanams permanently and for ever. The provision entitling the donor to joint enjoyment with the donee during his lifetime may for the purposes of this case be neglected. At the time of the gift Ammu Amma had several children besides the 2nd defendant, but the 2nd defendant is the only survivor of them at present. The gift may be briefly stated to be one to Ammu Amma and her children. The appellant's contention is that it should be regarded as a gift, jointly to Ammu Amma and her children alive at the date of the gift, and that on the death of the other donees it survived to the 2nd defendant exclusively. This contention is absolutely untenable in the face of the cases already decided by this court. It is unnecessary to refer to precedents earlier than the Full Bench ruling in *Kunhacha Amma* v. *Kutti Mammi Hajee*[1]. In that case a gift to a Mahomedan woman (governed by the Marumakkathayam law) and her children was held by the Full Court, concurring with *Best* and *Subrahmanya Aiyar* JJ., the referring Judges, to enure in favour of the donee and her children with the incidents of Tarwad property, and that the property could not be attached for the debts of one of the children as he had no disposable interest in it. The decision was no doubt based on the principle enunciated by the Judicial Committee of the Privy Council in *Sreemutty Soorjeemoney Dossee* v. *Denobundoo Mullic*[2] and *Mahomed Shumsool* v. *Shewakram*[3], that in the construction of instruments the law applicable to the parties and the mode in which the property is generally held by them should be taken into account in determining the intention of the donor and the estate which the donee would take under the instrument. According to the Marumakkathayam law, property is held by the members of a Tarwad jointly without any right to compulsory partition and without any individual right of disposal so long as the Tarwad continues to exist. It follows therefore that the property gifted must be taken to belong to Ammu Amma and her children with the abovementioned incidents of Tarwad property. As according to the Marumakkathayam system all members born in the family acquire by birth a right in the Tarwad property, the issue of Ammu Amma's female children became entitled on

1. (1892) I. L. R. 16 M. 201.

2. (1857) 6 M. I. A. 526.

3. (1874) I.L.R. 2 I. A. 7.

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their birth to the property equally with Ammu Amma and her children existing at the date of Exhibit A. This point was expressly decided in the subsequent case of *Katankandi Koma* v. *Siva Sankaran*[1]. In *Pattatheruvath Pathumma* v. *Mannamkunniyil Abdulla Haji*[2], the learned *Chief Justice* and *Wallis* J. and in *Kunhamina* v. *Kunhambi*[3], *Miller* and *Munro* JJ., held that none of the persons taking under such an instrument has any right of disposal of his or her interest contrary to the Marumakkathayam law. In *Abdulla* v. *Chekkootti*[4] and in *Parvathi Kattilammah* v. *Ramachandra Ejaman*[5], it was held that those who take under such an instrument of gift would be regarded as a Tarwad for the purpose of management of the property and that the senior male member would have the right of management as in the case of ordinary Tarwad property. Mr. Ramachandra Aiyar relies on certain observations contained in the judgment of *Moore* and *Sankaran Nair* JJ., in *Koroth Ammankutti* v. *Perungottil Appu Nambiar*[6], in support of his contention that so long as the 2nd defendant should live the other members of the Tarwad would have no right to the property in question. In that case the gift was made to a woman and her children. A decree was obtained by a creditor against the assets of one of the children who had died prior to the suit. The decree-holder sought to attach his interest in the gifted property, but the learned Judges held that the share of the deceased passed by survivorship to the other children and that the creditor had nothing to proceed against. The case therefore affirms the joint holding by all the donees and the absence of any separate interest in any of them capable of being disposed of by him. The observation relied on by the appellants is this.—" The District Judge has held that Unichira and her sons formed a separate Tarwad by reason of their having obtained these properties by gift and therefore Koran Nambiar had no interest available for attachment and sale. We are unable to agree with the District Judge in his view that when a female and some of or all her children obtain any property from their father or Karnavan, as in this case, they are thereby constituted into a Tarwad by themselves, the senior member among them having the ordinary rights of

1. (1909) 20 M. L. J. 134
2. (1907) I. L. R. 31 M. 228.
3. (1908) I. L. R. 32 M. 315.
4. (1910) 20 M. L. J. 368.
5. (1910) 1. M. W. N. 124.
6. (1906) I. L. R. 29 M. 322.

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the Karnavan of a Malabar Tarwad so far as the other members in his branch are concerned." According to this dictum, it is contended that, as the female donee and her children are not constituted into a Tarwad, the children of the donee do not acquire an interest in the property under Exhibit A, and that consequently Ammu Amma's issue could not acquire a right in the property in dispute during her life-time. This construction of the dictum cannot be upheld. It must be noted that the decision in *Kunhacha Amma* v. *Kutti Mammi Hajee*[1], was expressly affirmed and adopted by the learned Judges. The proposition that the property gifted was taken by the donees with the incidents of Tarward property, was not departed from, and one of such incidents, *viz.*, that the holders of the property have no right of disposal and that the property goes by survivorship to the remaining holders on the death of any, was affirmed and acted on. No question arose in the case whether the members of the Tarwad born after the date of gift would take an interest in it by birth or not. What then is the meaning of the statement "that the donees could not be taken to be constituted into a Tarwad by themselves, the senior donee having the ordinary rights of a Karnavan of a Malabar Tarwad so far as the other members in his branch are concerned?" It can only be taken to mean that they do not become a Tarwad so as to give the Karnavan all the ordinary rights of a Karnavan over the members of his Tarwad. It is only in this sense that this statement could have been understood in *Pattatheruvath Pathumma* v. *Mannamkunniyil Abdulla Haji*[2] and *Kunhamina* v. *Kunhambi*,[3] which quote it with approval. The question—what rights a Karnavan of such special property held by a branch of a Tarwad would have with respect to the other members of the branch—has not been elucidated by the learned Judges who decided *Keroth Amman Kutti* v. *Prungoitil Appn Nambiar*[4]. But there can be no doubt that he cannot have all the rights of a Karnavan over the junior members of his Tarwad. He is not their guardian and has no right of supervision or control over them. He is not responsible for their protection, education or maintenance. His right is confined to the management of the special property owned by him and the other members of his

1. (1892) I. L. R. 16 M. 201.
2. (1907) I. L. R. 31 M.228.
3. (1910) I. L. R. 32 M. 315.
4. (1906) I. L. R. 29 M. 223.

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branch. His title to manage them has been upheld as already mentioned in *Abdulla* v. *Chekkootti*[1] and *Parvathi Kattilammah* v. *Ramachandra Ejaman*[2]. What his duties are with respect to the disposal of the income of the property and what the rights of the other members of the branch are to receive a portion of the income are points that have not yet been judicially decided, and it is not necessary to make any further remarks on them as they do not arise for decision in this case. In Appeal No. 122 o 1905 it was held that, where a member of a branch of a Tarwad holding special property has certain properties standing in his own name, there is no presumption that such property belongs to the branch and not to himself, although it has often been held that there is a presumption that all the properties standing in the name of any member of a Tarwad belong to the Tarwad and that the onus lies on him to rebut such presumption. Whatever may be the scope of the dictum that the manager of special property belonging to a branch has not got all the powers of a Karnavan with respect to the other members of the branch, it certainly does not mean that the members who are born in the branch would not acquire a right in the property by birth. This contention must therefore fail.

The argument that the demise is valid, even if the property belongs to the whole Tarwad, must also fail. We cannot attach weight to the consideration that the demise is in favour of one of the junior members inasmuch as, if it be valid in his favour, it must be equally so in favour of any person to whom he may alienate. That a Karnavan ordinarily cannot make an alienation for such a long period as sixty years cannot be doubted, and no special necessity or special benefit such as would justify it has been shewn.

It is also impossible to uphold, on the facts in this case, the contention that the demise may be maintained for a portion of the term granted by it, namely the usual period of 12 years. To do so would necessitate the making of a new contract for the parties different from what they intended. Then it provides for the payment of the value of improvement at the expiration of 60 years, the term fixed. It would not be reasonable to compel the 1st defendant to wait for 48 years for payment after his

1. (1910) 20 M.L. J. 368 2. (1910) 1 M. W. N. 12.

surrender or to require the plaintiff to make payment long before the time fixed in the document.

The next contention is that the 1st defendant being a co-owner, his action in constructing the building was not wrongful, that the Tarwad would sustain no injury by it, and that the plaintiff is not therefore entitled to the demolition of the building. We may say at once that it is not shewn that the Tarwad would sustain no injury at all by the 1st defendant's action. It is pointed out on the other hand that the Tarwad is growing in numbers, and that the demised paramba which is adjacent to the Tarwad house may be required for the construction of an additional residence for the members of the family. It is no doubt true that as between co-owners generally one of them who takes possession of a portion of the common holding cannot be said to be necessarily a wrong doer, and that this would be so even if he raised substantial buildings thereon. The principles applicable in such cases have been laid down in numerous decisions, which have benn collated in the elaborate Judgment of *Mookerjee* J. in *Ananda Chandra Sen* v. *Parbadi Nath Sen*[1]. The learned Judge states the principle thus—"Now, as was pointed out in "*Mohesh Narain* v. *Nawbut Pattak*[2], although in the case of "immoveable property, jointly owned, each co-owner is in theory interested in every infinitesimal portion of the subject-matter, and each has the right, irrespective of the quantity of his "interest, to be in possession of every part and parcel of the "property, jointly with the others; yet it does not follow that "one joint owner is entitled to maintain an action in ejectment "against a co-owner, merely on the ground that the latter has "taken exclusive possession of a portion of the joint property. "Such exclusive occupation may, under certain circumstances, "be perfectly legitimate and may not constitute an invasion of "the rights of the co-sharer; if there is no assertion of a hostile "title, no exclusion or ouster, an action in ejectment cannot lie. "I am not prepared to hold, that an exclusive appropriation by "one co-owner of a part of the joint land to his own use by "the erection of a permanent structure, is necessarily evidence "of an ouster; it may well be, that the lands cannot be enjoyed, "as each of the joint-owners is entitled to enjoy them, without

1. (1906) 4 C. L. J. 198.

2. (1905) 1 C. L. J. 437. S. C. I. L. R. 32 C. 837.

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"making extensive and permanent improvements. Why should "the co-owner, willing to bear the expense of such improve-"ments be compelled to desist from making them and be required "to leave his lands in a condition in which he cannot use them "advantageously to himself, for he is necessarily so compelled "and required, if his improvements are to be treated as hostile "acts subjecting him to the penalties visited upon a co-owner "found guilty of an ouster of his companion in interest. [Free-"man on Co-tenancy and Partition, S. 240]. The rule is "well settled that the plaintiff, who complains of the act of his "co-owner cannot obtain a decree for demolition of buildings "or for joint possession, unless he can establish that he has "sustained some substantial injury by reason of the act of which "he complains." This principle, however, is not applicable to the case of the members of a Marumakkathayam Tarwad. The property of such a Tarwad is no doubt vested in all the members of the family as owners. But it must be remembered that none of the members has a right to any particular portion of the property. On the other hand, the Karnavan of the Tarwad is entitled to manage the whole estate and to be in possession thereof for that purpose. His possession no doubt is the possession of all in law so far as its effect on the title of the members is concerned, but nevertheless no junior member is entitled to take actual possession of any portion of the property without the consent of the Karnavan. In *Kannan* v. *Tenju* [1], the Karnavan's right to actual possession as against an Anandravan has been recognised by this court. Any other rule would indeed destroy one of the most important rights of the Karnavan and make it impossible for him to carry on the management of the estate. It would therefore be impossible to hold that any Anandravan might take possession of any particular portion of the family estate he might choose and erect buildings on it and continue in occupation of it. Mr. Ramachandra Aiyar relies in support of his contention on *Nocury Lall Chukerbutty* v. *Bindabun Chunder Chuckerbutty* [2]. In that case one of the coparceners of a Dayabhaga family in Bengal had occupied and constructed a building on a piece of land belonging to the

1. (1882) I. L. R. 5 M. 1. 2. (1882) I. L. R. 8 C. 708.

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family and the question was, whether the plaintiff in the suit, another member, (it does not appear that he was the manager) was entitled to have the building demolished. It was found that the plaintiff took no steps to prevent the erection of the building when it was actually going on. *McDonell* and *Field* JJ. held that in the circumstances of the case demolition should not be ordered as he had failed to show that injury had accrued to him by reason of the erection of the building. The decision is not applicable to the present case. In so far as it proceeds on any estoppel of the plaintiff in consequence of his conduct, it is inapplicable, as the plaintiff objected to the demise in this case and the defendant according to the courts below at one time agreed to give up the demise but subsequently withdrew his consent and proceeded to build on it. The right of a co-parcener of a Dayabhaga family is materially different from that of a junior member of a Marumakkathayam Tarwad in the matter of dealing with the joint estate of the family. The former may enforce a partition at any time he pleases. The latter can do so under no circumstances. Where a co-parcener entitled to partition erects a building on family land without the consent of the manager, the court may hesitate to direct its demolition, seeing that at a partition between the parties the court could, in the exercise of its equitable jurisdiction, allot the land built on to the co-parcener who made the building and thus avoid the hardship caused by the demolition. But in a Marumakkathayam family no such course is possible, as the court has no power to decree a partition, and it would not be fair or equitable either to compel the Karnavan to purchase the building constructed by a junior member or to deprive the Karnavan of possession of part of the family property for ever. The conclusion must therefore be that the defendant cannot resist recovery or demolition of the building on general principles.

It remains to deal with the claim to compensation for improvements which is made on the ground that the 1st defendant honestly believed that the 2nd defendant was the sole owner of the property during her life-time and was therefore entitled to grant a demise, and that he believed himself *bona fide* to be a

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lessee, thus entitling him to compensation under S. 5 of the Malabar Tenants Improvements Act. Mr. Anantakrishna Aiyar for the respondent contends that no claim to compensation was made on the ground put forward in this court. We find on reference to the written statement that the right to compensation was not rested on any particular ground, and issue No. IV relating to the question was framed in general terms. The District Munsif dealt very briefly with the question, observing that 'even a trespasser when he makes improvements *bona fide* is entitled to the value of the improvements.' The Subordinate Judge observes—"He is not a trespasser believing in good faith that he had power to make improvements. He is not a tenant within the meaning of the Improvements Act." We cannot say that the 1st defendant is disentitled either by the terms of his written statement or by the frame of the issue to contend that he *bona fide* believed that the 2nd defendant was the absolute owner of the property entitled to deal with it at her pleasure. We were at first inclined to direct an enquiry with reference to this point, but we find it would be useless to do so, as it is perfectly clear on the facts appearing on the record that the plaintiff objected to the Kanom before the defendant constructed the building and the latter at one time actually agreed to give it up but subsequently refused to do so. It is not, therefore, open to him now to say that he made the building *bona fide* under the impression that the land belonged absolutely to his mother. He was certainly put upon enquiry as to her real title; and if he put a wrong construction on the deed of gift, on which the plea of *bona fide* is sought to be maintained, he must take the consequence. We must dismiss both the second appeals with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Phillips.

P. Abdul Khadir .. .. Appellant* (*2nd Counter-petitioner*)

v.

Ajiyur Ahammad Shaiva Ravuthar's son, Ajiyur Ahammad Shaiva Ravuthar and others .. Respondents (*Petr. & 1st Counter-petr*).

Abdul Khadir *v.* Shaiva Ravuthar.

C. P. C., S. 48, Cl. 2—" Fraud "—Evasion of arrest, a fraud—Discretion of court—Quantum and nature of proof by creditor—Fraud of one of several judgment-debtors — Effect on execution against others—" The judgment-debtor," meaning of.

Per *Curiam* :—A deliberate evasion of the process of the court with intention to defeat execution of the decree would amount to fraud within the meaning of S. 48, C. P. C.

Per *Sundara Aiyar* J. :—The return of a process server is admissible, under S. 35 of the Evidence Act, as evidence of the facts reported by the process server: and even if the statement of the process server be legally inadmissible, it is open to a court to infer from the circumstances of the case that the absence of a judgment-debtor was due to a deliberate attempt to evade arrest.

The decree-holder is not bound to show continuous diligence during all the time prior to the application: nor need he shew that but for the fraud or force complained of he would have realized the fruits of his decree; and all that he has to prove is that the judgment-debtor, by fraud or force, at some time prevented the execution, *i. e.*, made the decree-holder's attempts to execute at the time to which the fraud relates, unsuccessful, and it is not necessary for the decree-holder to show that the judgment-debtor guilty of fraud had means to pay the decretal amount or that the decree-holder could not, at any other time before his last application, have realized his decree.

Semble :—The words " nothing in this section shall be deemed to preclude a court from ordering the execution of the decree " in S. 48, C.P.C., are not really intended to give the court power either to grant or refuse execution as it might think fit.

Per *Sundara Aiyar* J. (*Phillips* J. *contra*) :—The fraud of one judgment debtor cannot have the effect of extending the time for execution as against his co-judgment debtors.

Per *Phillips* J. :—The fraud of one judgment-debtor enlarges the time for execution not only against himself, but also against his co-judgment-debtors.

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* A. A. A. O. No. 45 of 1910. 27th September, 1911.

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Appeal from the order of the District Court of North Malabar in A. S. No. 419 of 1909 presented against the order of the District Munsif of Cannanore in R. E. P. No. 705 of 1909 (in O. S. No. 591 of 1896).

J. L. Rosario for appellant:—The facts do not amount to fraud. Even if they do, the decree-holder has not been diligent. The court would not, under such circumstances, direct execution—*Seshachalam* v. *Rajam* [1], *Annamalai* v. *Rangasami* [2]. Issuing of execution is a matter of discretion—*Rai Sham Kishen* v. *Damar Kumari* [3]. At any rate, the fraud of one cannot keep the decree alive against the other. In fact "the judgment-debtor" must, according to the well-known rule of construction which has been applied in the case of S. 7, Limitation Act, mean the sole judgment-debtor or all the judgment-debtors. The fraud of one alone would not keep the decree alive against the others.

C. V. Ananthakrishna Aiyar, for respondent, relied upon *Venkayya* v. *Raghavacharlu* [4] on the question of diligence and also *Mohsin Ali* v. *Masul Ali* [5]. As to discretion, if there was any, he submitted it ought to be exercised in his favour. The decree being a joint one the fraud of one must keep the whole decree alive on the principle which has beeen given effect to by Art. 179 (Art. 182.) of the Limitation Act. The same principle used to be applied under the previous Limitation Act also. In a case not covered by Art. 182, their Lordships of the Privy Council applied the principle of Art. 182—*Ashfag Husain* v. *Gauri Saha* [6]. As to the word "judgment-debtor" the construction suggested does not hurt me. The decree is a joint and several decree so far as the judgment debtors are concerned, *i.e.*, so many decrees as there are judgment-debtors in addition to a decree against them all. The several decree against the debtor in default cannot be barred. My submission is, neither would the joint decree be barred. S. 7 of the Limitation Act has to do with rights—applying to decrees—to joint decree-holders. The right of the decree-holders is not joint and several. It is only joint.

J. L. Rosario replied.

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1. (1898) 8 M. L. J. 203.
2. (1883) I. L. R. 6 M. 365.
3. (1906) 11 C. W. N. 440.
4. (1899) I. L. R. 22 M 320.
5. (1911) 8 A. L. J. 1020.
6. (1911) I. L. R. 33 A. 264 (C. P.)

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The Court delivered the following

JUDGMENT :—*Sundara Aiyar* J. :—This second appeal arises in proceedings in execution of the decree of the District Munsi's Court of Cannanore for money in O. S. No. 591 of 1896. The present application for execution was presented on the 27th September, 1909. The decree was passed on the 15th January 1897. So this application was put in more than 12 years after the date of the decree. The judgment-debtors objected that the application was barred by S. 48 of the Code of Civil Procedure, as more than 12 years had elapsed since the date of the decree and the decree-holder had made prior application for execution. The application immediately preceding the present one was presented on the 11th January 1909 for attachment of the defendant's moveables and for their arrest. While that application was still pending, the present one was put in. In addition to the reliefs asked for in the previous application the plaintiff prayed also for the attachment of immoveable properties belonging to the defendants. The District Munsif disallowed the objection, holding that the defendants were fraudulently evading the execution of the decree and that therefore the bar under S. 48, Civil Procedure Code, did not apply. On appeal the District Judge confirmed the Munsif's finding of fraud so far as the 1st defendant was concerned, as he had evaded the execution of warrants of arrest taken out against him in order to defeat the execution. But he held that no fraud was proved against the 2nd defendant. He was, however, of opinion that, as fraud had been proved against the 1st defendant, the plaintiff was entitled to execute the decree against both the defendants. The 2nd defendant has appealed to this court againt the order of the District Judge. His contentions are (1) that the finding of fraud as against the 1st defendant is not based on legal evidence; (2) that even if that finding be upheld, it has not been proved in the case that plaintiff exercised due diligence in the execution of his decree and that he was prevented by the 1st defendant's fraud from realising the amount due to him and that this court has a discretion to refuse execution in the circumstances; and (3) that, in any event, the 1st defendant's fraud would

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not justify the granting of the execution against the 2nd defendant. With regard to the first contention I am of opinion that it is not entitled to prevail. Mr. Rozario's argument on this point is that the District Judge acted illegally in relying on the statements contained in the process-server's returns as evidence of intentional evasion of the warrants of arrest by the 1st defendant. But, in my opinion, the returns are admissible under S. 35 of the Evidence Act, as evidence of the facts reported by the process-server. Even if the statement of the process-server that the 1st defendant left his usual place of residence in order to escape arrest should be regarded as legally inadmissible, it was open to the District Judge to infer from the circumstances of the case that his absence was due to a deliberate attempt to evade arrest. It has been fully established by decided cases that the expression "fraud" in S. 48 should be construed in a broad sense, and that a deliberate evasion of the process of the court with intention to defeat the execution of the decree would amount to fraud. I would overrule this contention. I am also of opinion that the secnd contention is equally unsustainable. S. 48, Civil Procedure Code, provides: "Nothing in this section shall be deemed to preclude the court from ordering the execution of a decree upon an application presented after the expiration of the said term of 12 years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree *at some time* within twelve years immediately before the date of the application." Fraud *at some time* within 12 years prior to the application for execution being sufficient to entitle the decree-holder to ask for execution, it is clear that it is not incumbent on him to show continuous diligence during all the time prior to the application. The language of the section also shows clearly that the decree-holder is not bound to show that, but for the fraud or force complained of, he would have realised the fruits of his decree. All that has to be proved is that the judgment-debtor, by fraud or force, at some time prevented the execution, that is, in my opinion, made the decree-holder's attempts to execute at the time to which the fraud relates, unsuccessful. It is not necessary, as contended by Mr. Rosario, for the decree-holder to show that the judgment-debtor guilty of fraud had means to pay the decree amount or that the decree-holder could not, at any other time before his last application

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have realised his decree. Mr. Rosario relies on *Annamalai* v. *Rangasami* [1] and *Seshachalam Chetty* v. *Rajam Chetty* [2] in support of his argument. The former case does not really help him. It is true, no doubt, that it was found in that case by the lower court that the judgment-debtor was possessed of means to satisfy the decree and that the decree-holder had exercised due dilligence in his attempts to execute. But the learned Judges who decided the case did not lay down that either of these conditions should be satisfied. The case is authority only for the position that the expression 'fraud' is used in the section in a comprehensive sense so as to include all improper attempts to defeat the execution. The judgment of *Shephard* J. in the second case no doubt supports the appellant's argument. But the learned Judge's attention does not appear to have been drawn to the language of the section already referred to, which, in my opinion, clearly shows that the argument cannot be supported. On the other hand *Venkayya* v. *Raghava Charlu*[3] (in which *Seshachalam Chetty* v. *Rajam Chetty*[2] was referred to in the arguments) is clearly against Mr. Rosario's contention. The learned Judges who were parties to the judgment, adverting to the language of the section, were of opinion that fraud or force on the part of the judgment-debtor at any stage of the execution would give the decree-holder a fresh starting point and a fresh period of years from that date. See also *Mohsin Ali* v. *Masul Ali*[4]. With regard to the next contention of Mr. Rosario that the court has a discretion to allow or refuse execution after 12 years even where fraud has been proved, I have serious doubts whether such a discretion exists. *Rai Sham Kissen* v. *Damar Kumari Debi*[5] no doubt supports the appellant's argument. But I am inclined to hold that the language of S. 48, "nothing in this section shall be deemed to preclude a court from ordering the execution of the decree," etc., was not really intended to give the court power either to grant or refuse execution as it might think fit. The former part of the section says that "no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years," etc. It appears to me that the draftsman,

1. (1883) I.L.R. 6 M. 365.
2. (1898) 8 M.L.J. 203.
3. (1879) I.L.R. 22 M. 320.
4. (1911) 8 A.L.J. p. 1020.
5. (1906) 11 C. W. N. 440.

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having provided that the court shall be precluded from granting execution after 12 years, merely meant that the rule of limitation thus provided would not be applicable in cases where the judgment-debtor is guilty of fraud or force when he went on to say "nothing in this section shall be deemed to preclude the court from ordering the execution," etc. The provision that execution should be allowed for 12 years from the time that fraud or force has been used seems to me to support this view. It is, however, unnecessary to decide this point as I am clearly of opinion that there is no ground in this case for the exercise of any discretion against the decree-holder, and I reserve to myself an opportunity for considering it further when it should be necessary to decide the question.

It remains to deal with the question whether the District Judge having found that the 2nd defendant was guilty of no fraud or force, the plaintiff is entitled to execution against either of the defendants or both. The question really arises only in so far as it concerns the prayer for the attachment of immoveable property, as in other respects the application for execution was only a continuation of the previous application. It is necessary to turn once more to the language of S. 48. It gives power to the court to order the execution of the decree "where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application." The learned vakil for the appellant contends that, where there are more judgment-debtors than one, the court cannot allow execution afrer the expiration of 12 years, at all events unless both the judgment-debtors are guilty of fraud or force; while Mr. Anantakrishnaiyer's contention for the respondent is that the fraud or force of any one of several judgment-debtors who are jointly and severally liable under a decree would give additional time to the decree-holder against them all. Neither of these contentions commends itself to me. Having regard to the object of the section I am of opinion that this is not a case where the singular "judgment-debtor" must be taken to mean the plural "judgment-debtor" where there are several judgment-debtors. It may happen that one of the judgment-debtors is in solvent circumstances, and it might be profitless for the decree-holder to take out execution against the other judgment-debtors. The result of upholding

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the appellant's contention would be that, though the only solvent judgment-debtor might be guilty of fraud, the decree-holder would not be entitled to time against him because the other judgment-debtors, who had no means of discharging the debt, were not guilty of any fraud or force. It seems to me clear that the misconduct of any particular judgment-debtor would give the decree-holder further time against him for execution. But would it give him time against his co-judgment-debtors? I think not. The expression "the judgment-debtor" may mean either the particular judgment-debtor against whom execution is sought or all the judgment-debtors. But I do not think I would be justified by any rule of interpretation or by the ordinary meaning of the language used as men of common sense would understand it in holding that 'the judgment-debtor' means any one of a number of judgment-debtors against whom the decree has been passed. Mr. Anantakrishnaiyer contends that the policy of the Limitation Act is to treat a decree against a number of persons jointly and severally as entire for the purpose of execution, and that S. 48 should be interpreted in the light of this policy. No doubt, where an appeal has been preferred against a decree or the decree has been amended or judgment reviewed, time would run for execution only from the date of the final or revised decree, though not all the judgment-debtors may be concerned in the appeal, review or amendment. It is also true that, where an application is made against one of the several judgment-debtors, that would give a further starting point as against all including those against whom no application has been made. But it may be that a different policy underlies S. 48, C. P. C. The legislature gives 12 years time as a reasonable period within which execution may be expected to be finished, and provides for an extension of the time where fraud or force is resorted to by a judgment-debtor. There is nothing improbable in the legislature having wished to confine this special relief based on the ground of fraud to the particular judgment-debtor or judgment-debtors guilty of misconduct. Article 182 of the Limitation Act gives a fresh starting point of limitation, in one class of cases, against some only of several joint and several judgment-debtors. Clause 6 in the 3rd column of that article lays down that, where a notice to show cause why the decree should not be executed against a judgment-debtor is issued

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under a provision of the Civil Procedure Code requiring such notice, a further starting point is obtained in such a case against those only to whom such notice is issued. The grounds of the extension being the issue of the notice, the legislature seems to have considered it proper to confine it to the person to whom notice is issued. It appears to me that a similar reason probably induced the legislature to restrict the relief under S. 48 also so as to be available only against the person guilty of fraud or force. At any rate, I am unable, against what appears to me to be the plain meaning of the words of the section, to hold that fraud by one judgment-debtor would give relief to the decree-holder against his co-judgment-debtors. I must therefore hold that the plaintiff's application is barred as against the 2nd defendant so far as the prayer for attachment of immoveables is concerned. I would modify the order accordingly. The plaintiff and the 2nd defendant must each bear his own costs throughout.

Phillips. J.:—This is an appeal by the second defendant against an order allowing a decree to be executed after the expiry of twelve years from its date on account of the fraud of the first defendant. The fraud alleged and proved is the evasion of a warrant of arrest by first defendant, and I agree with my learned brother for the reasons given by him that such evasion in order to prevent execution of the decree does amount to fraud. The most important question to be determined is whether the fraud of the first defendant keeps the decree alive as against the second defendant also. S. 48 (2), C. P. C., runs as follows: "Nothing in this section shall be deemed to preclude the court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has by fraud or force prevented the execution of the decree at some time within twelve years immediately before the date of the application." It is contended that the use of the article "the" before judgment-debtor shows that the clause applies only to cases of fraud by a single judgment-debtor, or (in decrees where there are several judgment-debtors) to cases of fraud by all the judgment-debtors—as the use of the singular "judgment-bebtor" may also include the plural. If this interpretation were applied, it would follow that, where there was a decree against ten judgment-debtors, and only nine of them had

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been guilty of fraud, the section would not apply, and I do not think that this was the intention of the legislature, nor do I think that this interpretation need be put upon the section. A further contention is raised that S. 48 (2) only enlarges the time for execution as against the particular judgment-debtor who has been guilty of fraud. There is, in my opinion, nothing in the wording of the section to support this argument, for it merely lays down that, if execution has been defeated by force or by fraud of the judgment-debtor, the execution of a decree may be ordered after the expiry of twelve years and does not say that the execution shall be limited, and ordered only against the fraudulent judgment-debtor. No authority has been cited for the proposition that a joint decree may be barred against one of the joint debtors and not against the others, whereas explanation I to Art. 182 of the Limitation Act is authority for the proposition that execution against one of several joint debtors saves limitation as against them all. Applying the same principle to this case, I think that the fraud of one judgment-debtor must be held to enlarge the time for execution not only against himself but also against all the joint judgment-debtors. If execution is to be allowed only against the fraudulent judgment-debtor it would be open to a pauper, who was one of several joint debtors, to prevent by fraud or force the execution of a decree within twelve years, and the result of his action would be to exonerate his solvent fellow debtors, leaving the unfortunate decree-holder a remedy against the pauper alone. If the article 'the' before "judgment-debtor" in S. 48 be read in a generic sense, the difficulty of interpretation is, in my opinion, removed, and I must hold that the section is not intended to enlarge the time for execution of the decree only against the judgment-debtor who is guilty of fraud, but allows execution of the decree against all the judgment-debtors, even though only one of them has been guilty of the fraud or force.

In *Rai Sham Kissen* v. *Damar Kumari Debi*[1] it was held that the power of a court under S. 230 of the old Code (corresponding to S. 48, C.P.C.,) was discretionary. Whether this be so or not it is unnecessary to determine now, for in

1, (1906) 11 C.W.N. 440.

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this case, which is one of fraudulent evasion, I think the discretion, if any, should be exercised in favour of allowing execution.

Holding this view it is unnecessary to consider the further plea urged for respondent that the present application for execution should be treated as a continuation of an application put in before the expiry of twelve years from the date of decree. I would, therefore, dismiss the appeal with costs.

Sundra Aiyar J.—As my learned brother is of opinion that the appeal should be dismissed with costs, it is dismissed with costs under S. 98, C. P. C.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Walajapet Rajammal .. Appellant*

v (*Accused*).

King-Emperor

Rajammal v. King-Emperor.

Letters Patent, Cl. 15 — "Trial" — Meaning of—Whether includes "appeal."

The word "trial" in Cl. 15 of the Letters Patent includes appeal; and no appeal under the Letters Patent lies from the judgment of a single judge of the High Court passed in an appeal against an acquittal.

Appeal under S. 15 of the Letters Patent against the conviction and the sentence by the Hon'ble Mr. Justice *Spencer* in C. A. No. 270 of 1911, presented to this Court against the order of acquittal in Calender Case No. 174 of 1910 on the file of the Joint Magistrate of Chingleput.

This was an appeal from the judgment of a single judge of the High Court (*Spencer* J.) setting aside an order of acquittal and convicting the accused under S. 377, I. P. C., in an appeal against an acquittal order preferred by Government.

V. C. Sesha Chariar for appellant.

The Court delivered the following

JUDGMENT:—No appeal lies in this case. The word "trial" in Clause 15 of the Letters Patent includes appeal, *vide* Clause 30 of the Letters Patent of this court. The appeal is rejected.

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* L. P. A. 112 of 1911. 6th November, 1911.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Abdur Rahim.

H. H. M. Jijamba Bai Sahib by her authorised Agent K. Ramachandra Rao .. Appellant * (*1st Defendant*)

v.

Saguiram Jathai Row Sahib & others .. Respondent (*Plaintiff*).

Hindu Law—Joint family—Suit and decree against de facto managing member without describing him as such—Effect of.

Jijamba Bai Sahib v. Jathai Row Sahib.

If a suit is brought against a *de facto* managing member of a Hindu family to enforce a debt binding on the family property and a decree is passed, the decree will bind the other members of the family who are not parties to the suit if it appears that by the suit relief was sought to be, and was in fact, obtained against the defendant as representing the family and not merely in his individual capacity.

The mere fact that a person was not described as the managing member does not necessarily show that he was not so in fact.

Second appeal from the decree of the District Court of Tanjore in A. S. Nos. 928 and 929 of 1908 presented against the decree of the Court of the District Munsif of Tanjore in O. S. No. 400 of 1907.

This was a suit for redemption of a mortgage executed by the father of the plaintiff. The plaintiff was the third son of the mortgagor. The defendant was the mortgagee who had himself purchased the property in execution of a decree in respect of the suit mortgage itself in which suit he had omitted to implead the plaintiff but had impleaded the first and second sons of the mortgagor and the mortgagor's widow. The binding nature of the debt was not disputed by the plaintiff, but he contended that he was entitled to redeem the whole property solely by reason of his not being impleaded in the prior suit. The first court allowed redemption to the extent of plaintiff's share only. On appeal by both the parties it was held that the plaintiff was entitled to redeem the whole. The contention in second appeal was two-fold: (1) There was a substantial representation of the plaintiff in the previous suit by reason of the managing member and all the other members of the family being impleaded; (2). In any event plaintiff was not entitled to redeem more than his share in this suit; the mortgagee's purchase was not null and void and the effect of the purchase was a splitting up of the mortgage,

* S. A. No. 180 of 1910. 18th October, 1911.

Jijamba Bai Sahib v. Jathai Row Sahib.

the mortgagee not being compellable to be subjected to a redemption of the whole against his will.

S. Srinivasa Aiyar for appellant.

The Advocate-General (P. S. Sivaswami Aiyar) for respondent.

The Court delivered the following

JUDGMENT:—The first point on which the judgment of the District Judge is assailed is that although the present plaintiff was not made a party to the previous suit instituted by the predecessor in title of the appellant in the present appeal who was aware of the plaintiff's existence and interest in the property yet the mortgage-debt having been incurred by the father of the plaintiff, and as such binding on him and his brothers, the sale in execution of the decree obtained by the predecessor in title of the appellant against the three brothers other than the plaintiff would be binding on the plaintiff. It has been settled that if a suit is brought against a managing member of a Hindu family to enforce a debt binding on the family property and a decree is passed, that decree will bind the other members of the family who are not parties to the suit if it appears that by the suit relief was sought to be, and was in fact, obtained against the defendant as representing the family and not merely in his individual capacity. There can be no doubt that the decree in O. S. No. 35 of 1898 was intended to bind the family property and in pursuance of that decree the plaintiff's interest in the property was sold and not merely the interest of the three brothers impleaded in the suit. It does not appear, however, on the record, as it stands, that any of the three defendants impleaded in that suit was in fact the managing member of the family. The family, however, consisted only of four brothers of whom the plaintiff was the youngest, and of others who were also minors but were represented in the suit by the mother as guardian *ad litem* and of the eldest brother who was adult being about 30 years of age at the time. The eldest brother who was the first defendant in the former suit would in the ordinary course of events be the managing member but it might be that in fact he was not the manager, of the family affairs. The mere fact that the first defendant in that suit was not described as the managing member does not necessarily show that he was not so in fact. We think, therefore, that before deciding the other questions raised in this second appeal we should have a finding on the question whether the first

defendant in O. S. No 35 of 1898 was the manager of the family. We must ask the District Court to return a finding on this question. The parties will be at liberty to adduce any fresh evidence on the point. The finding will be submitted within three months, and seven days will be allowed for filing objections.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Cherriyoni *alias* Avinhat Moothavar styled Bayyornala Kothe Raman .. Appellant * (*1st Defendant*)

v.

Nhera Poyilil Parkum Minger Pocker and another .. Respondents *Plaintiff and 2nd defendant.*

Kothe Raman v. Minger Pocker.

C. P. C., S. 102—Test as to nature of suit—Deed—Construction—Kanom—Personal remedy for deficit—Claim for sale abandoned, effect of.

It is the nature of a suit as originally framed that determines the question whether a second appeal is maintainable and not the form of the suit at a subsequent stage; and so where a suit was brought for the sale of the hypotheca and a personal decree but the prayer for the sale was subsequently withdrawn, *held*: that a second appeal lay.

A document ran as follows:—"I shall pay you the said sum of Rs. 200 before the 30th Makaram 1078 next and receive back this deed. If I fail to pay the amount at the prescribed time I agree to your realising the principal with interest accruing at 18 per cent. a year from the prescribed time so long as it remains unpaid, by causing sale of my jenmam and all other rights on the properties hypothecated and to pay the deficit, if any, in person * * ."

Held, that the mortgagee was bound to proceed against the hypotheca before claiming a personal decree and that he was not entitled to a personal decree against the mortgagor if he gave up the claim for sale.

Second appeal from the decree of the District Court of North Malabar in A. S. No. 222 of 1909 presented against the decree of the Court of the District Munsiff of Quilandy in O. S. No. 856 of 1907.

J. L. Rosario for appellant.

C. Madhavan Nair for respondents.

J. L. Rosario:—The mortgage here is by a *Stani.* The provision which looks like a personal undertaking to pay applies only to *principal.* Really it is not one. It uses the participle, and amounts to saying "on paying * * * I shall take back the receipts." The subsequent provision that

* S. A. No. 1043 of 1910. 15th November 1911.

Kothe Raman v. Minger Pocker.

the amount ought, in the first instance, to be realised out of the estate and for the balance he shall be liable personally, makes it clear that the liability is only contingent on the property not sufficing for the purpose. The debt purports to have been incurred for the payment of arrears on the Stanom property. What is more likely than that the mortgagee, a Stani, should provide that the Stanom property should in the first instance pay the amount and that only in the event of its not sufficing, the mortgagee, not being entitled to proceed against the succeeding Stani, should proceed against the executant personally.

C. Madhavan Nair submitted that the first clause contained the personal undertaking and in the latter portion the mortgagor only states the legal consequences. In a case with similar provisions, their Lordships of the Judicial Committee held the mortgagor personally liable—*Madappa Hegde* v. *Ramakrishna Narayan*[1].

The Court delivered the following

JUDGMENT :—The first defendant, a Stani, executed a hypothecation bond in favor of the plaintiff for a debt borrowed for the purpose of paying arrears of Government revenue on properties belonging to the Stanom. The document, Exhibit *A*, after setting out the purpose for which the loan was taken says. "I shall pay you the said sum of Rs. 200 before 30th Makaram 1078 next and receive back this deed. If I fail to pay the amount at the prescribed time I agree to your realising the principal with interest accruing at 18 per cent. a year from the prescribed time so long as it remains unpaid, by causing sale of my jenmam and all other rights on the properties hypothecated and to pay deficit, if any, in person * * " It will be observed that the parties depart from the phraseology ordinarily employed in hypothecation documents, that the amount may be recovered both from the property hypothecated and from the debtor personally and provide that the debt is to be recovered by sale of the hypotheca in the first instance, and only the deficit, if any, from the debtor. The debt was borrowed for a purpose which would justify charging it on Stanom property and the purpose is recited in the document.

There is, no doubt, a general covenant to pay the debt within the time specified which would ordinarily render the

1. (1911) I.L.R. 35 B. 327.

Kothe Raman v. Minjer Pocker.

covenantor personally liable, but the specific stipulation relating to the creditor's right in case of default shows, in our opinion, that the plaintiff was bound to proceed against the hypotheca before claiming a personal decree against the first defendant. In the plaint he asked for the recovery of the debt by sale of the mortgaged property but subsequently he gave up that claim. We must hold that he is not entitled to a personal decree against the first defendant. The case of *Madappa* v. *Ramakrishna Narayan* [1], relied on by Mr. Madhavan Nair, affords him no help. The Privy Council in that case merely held, on the construction of a particular document, that there was a covenant to pay interest for a disputed period.

Mr. Madhavan Nair also raised a preliminary objection that no second appeal lies in this case as the prayer for sale of the hypotheca was withdrawn and the amount sued for is less than Rs.500. But it is the nature of the suit as originally framed that determines the question whether a second appeal is properly maintainable. We reverse the decrees of the courts below and dismiss the second appeal with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Venkadam Narayana Iyer & another .. Appellants*
v. (*Defendants*)
Siva Subramania Iyer & another .. Respondents
(*Plaintiffs*).

Narayana Iyer v. Subramania Iyer

Hindu Law—Marriage expenses—Maternal uncle's disposition of an orphan girl—Abandonment of guardian—Suit by paternal grandfather and uncle—Marriage during pollution.

A Hindu maternal uncle who gives his sister's daughter, an orphan girl without her parents, in marriage when both her paternal grandfather and paternal uncle had abandoned their guardianship is entitled to be reimbursed with the expenses of the marriage; and the fact that he celebrated the marriage when the paternal family of the girl was under pollution owing to her paternal uncle's wife's confinement, does not disentitle him from recovering the expenses of the marriage, the marriage itself not being invalid on that account however objectionable the celebration of the marriage might have been from a ceremonial point of view.

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* S. A. No. 949 of 1910. 30th October 1911

1. (1911) I. L. R. 35 B. 327.

Narayana Iyer v. Subramania Iyer

Second Appeal from the decree of the Court of the Subordinate Judge of Tinnevelly in A. S. No. 103 of 1908 presented against the decree of the Court of the Additional District Munsif of Tinnevelly in O. S. No. 52 of 1907 (O. S. No. 233 of 1906) on the file of the Court of the District Munsif of Srivaikuntam.

Suit for the recovery of the expenses of the marriage of a minor girl living with the plaintiff. He was the maternal uncle of the girl. The defendants were the paternal grandfather and the paternal uncle. For several years during the lifetime of the mother and for 3 years subsequently, the child has been living with the plaintiff. The mother had got a decree for maintenance for herself and her child as against the defendants. Since the death of the mother, no attempt had been made by the defendants to get the child under their custody and the finding of the courts was also that they had made no contribution towards her maintenance. The child was over 11 years and the parties were Brahmins. As marriage could not well be postponed, plaintiff, settling a match, wrote to the defendants informing them of the match and asking them to provide funds for the marriage. The defendants wrote back saying that they had no objection to the match but that the day fixed was not agreeable to them as a lady in the house was advanced in pregnancy, and that they would have it performed *in their own house,* along with a daughter of the 2nd defendant some months thereafter more economically. Plaintiff, notwithstanding, performed the marriage in his own house and sued for the expenses. The events justified his hurry as the girl came of age before the time proposed by the defendants for her marriage. The defendants opposed the suit on the ground that plaintiff's performance of the marriage was officious and also improper as they were in pollution owing to the confinement of the lady above referred to and in disregard of their superior claims.

C. V. Anantakrishna Aiyar for appellant

S. Srinivasa Aiyar for respondents.

C. V. Anantakrishna Aiyar—submitted that the right to marry was in the defendants, and the plaintiff having in disregard of their rights, officiously, at an improper time and at greater expense married the girl, was not entitled to recover the

Narayana-Iyer v. Subramania Iyer

expenses incurred. [*Sundara Aiyar* J. referred to *Ranganaickammal* v. *Ramanuja Aiyangar*[1].] That case is distinguishable in that the performance of the marriage was by the mother in that case, who was the natural guardian, but here it was one of the defendants that was the guardian of the child.

S. Srinivasa Aiyar submitted that the guardianship of the girl was given up practically by the defendants, which was, as a fact, with the plaintiff. The girl was well advanced in age and her marriage could not safely be postponed as suggested by the defendants. Events proved that the action of the plaintiff was just and proper. Marriage during pollution is not invalid. *Factum valet* applies. An unmarried girl and a *Brahmacharin* are not affected by pollutions in the family. Consequently the girl herself was not under pollution. Pollution is a hindrance to marriage, chiefly on account of the parent being under a disability to officiate as the giver. Where the materlnal uncle who gave the girl in marriage was under no pollution the question of pollution in the paternal family is purely immaterial.

The Court delivered the following

JUDGMENT:—We are of opinion that, under the circumstances mentioned in the judgment of the Subordinate Judge, the plaintiff was Justified in giving the girl Meenakshi in marriage. The grandfather and the paternal uncle had practically abandoned guardianship of the girl, and, as found by the Subordinate Judge, their assurance that they would celebrate her marriage in proper form was not sincere. It is then urged by Mr. C. V. Anantakrishna Aiyar that, as the marriage was celebrated within two days of the confinement of the 2nd defendant's wife, we must disallow the plaintiff the expenses incurred by him in connection with the marriage. It might be that it was not proper on the part of the plaintiff, according to the Hindu ceremonial law, to celebrate the marriage during a period of pollution, as to which, however, we express no decided opinion. But it is not contended that the marriage would be invalid on that account, and we do not think we are called upon to punish the plaintiff by making him bear the expenses of the marriage.

The Subordinate Judge has, however, given a personal decree against the defendants. It will be modified by directing the

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1 (1911) 21 M.L.J. 600

Narayana Iyer v. Subramania Iyer.

decretal amount to be paid out of the family property in the hands of the defendants. Otherwise the decree is confirmed and the second appeal dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

Bava Jeer Chetti .. Appellant* (*3rd Respondent*)

v.

Bava Rangasawmi Chetti .. Respondent (*Petitioner*).

Jeer Chetti v. Ranga-sawmi Chetti

Provincial Insolvency Act, III of 1907—Petition for insolvency by debtors—Matters to be inquired into before adjudication.

A court is not bound to consider, before passing the order of adjudication on an insolvency petition by the debtor under Act III of 1907, whether the debts are real and whether the petitioner is unable to pay his debts, though the court has power to refuse to make an order of adjudication on grounds such as the prevention of abuse of court's process, etc; the proper stage for the enquiry of these matters being before the order of discharge is made.

Appeal from the Order of the District Court of Trichinopoly dated the 26th October 1909, in Insolvency Petition No. 3 of 1908.

A. Vishwanathan for *T.R. Venkatarami Sastri* for appellant.

V. C. Seshachariar for respondent.

A. Vishwanathan contended that the judge was bound to be satisfied before making the order of adjudication that the petitioner was unable to pay his debts and that his debts amounted to more than Rs. 500. These are matters on which the creditors ought to be given an opportunity to adduce evidence. He referred to Ss. 6, 11, 12, 14, 16 and 42. He relied upon *Subbiah Pillai* v. *Abdul Rashid*[1] and *Arunachallam Chetty* v. *Maung Po*[2]. In *In the matter of Vittal Das Kalidas*[3] a contrary view is taken. The cases in *Udayachand Maity* v. *Ram Kumar Khara*[4], *Samiruddin* v. *Kadumoyi Dasi*[5] and *Girwardhari* v. *Jai Narain*[6] are not really opposed to this view. They only negative discussion as to acts of bad faith and other matters.

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* A. A. O. No. 268 of 1909. 7th September 1911.

1. (1910) 4 Burmah L. T. 17;
2. (1911) 4 Burmah L. T. 18;
3. (1911) 9 I.C. 632.
4. (1910) 12 C. L. J. 400.
5. (1910) 12 C.L.J. 445.
6. (1910) I. L. R. 32 A. 645.

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V. C. Seshachariar submitted that *Girwardhari* v. *Jai Narain*[1] and *Udayachand Maity* v. *Ram Kumar Khara*[2] governed the case. Declaration of inability was in itself an act of insolvency and therefore no investigation into that question is provided for. He referred to S. 7 of the English Bankruptcy Act. In this matter, there is some difference between a creditor and a debtor. In the case of the creditor, the court acquires more proof than in the case of the debtor. The debtor is allowed to disprove the allegation of inability to pay debts.

The Court delivered the following

JUDGMENT:—*Sundara Aiyar* J.:—This is an appeal by a creditor against an order of the District Court of Trichinopoly, adjudicating the debtor an insolvent on his own application. The appellant in his statement in the lower court stated that all the debts stated in the debtor's petition except his own were non-existing debts at the date of the petition, having been previously discharged, and that the petitioner did not include in his schedule a house worth Rs. 1,000 which belonged to him. The learned District Judge, in his order, states that it was admitted before him that the debts due by the applicant exceeded Rs. 500. He disallowed the contention of the appellant that the court was bound to decide whether the debts which were questioned by him were real or fictitious debts and also whether the petitioner was really unable to pay his debts as stated by him in his petition. The argument appears to have been based in the lower court on the provisions of S. 15 Sub-S. (1), of the Provincial Insolvency Act III of 1907. The District Judge was of opinion that it was only in an application by a creditor that the court, under S. 15 (1), has to be satisfied whether the debtor was able to pay his debts and whether, from any other sufficient cause, no order of adjudication should be made.

It is contended in appeal before us that the District Judge was bound to consider, before passing the order of adjudication, whether it had been satisfactorily proved that the debts were real and that the petitioner was unable to pay his debts. The argument is not rested before us on S. 15 (1). I agree with the District Judge, in his construction of that section, that, whether

1. (1910) I. L. R. 32 A. 645.

2. (1910) 12 C. L. J. 400.

Jeer Chetti v. Rangasawmi Chetti. — Sundara Aiyar J.

the petition is by the debtor or by a creditor, the court has, under S. 15, to be satisfied of the petitioner's right to present the petition. When the petition is by a creditor, it has to be further satisfied of the service of notice on the debtor and of the alleged act of insolvency. When these facts are proved, the debtor is entitled to show that an adjudication ought not to be made because he is able to pay his debt or that, for any other sufficient cause, no order of adjudication ought to be made. The section is evidently borrowed from S. 7 of the English Act of Bankruptcy 1883 (46 and 47 Vic., Chap. 52) and the words of S. 15 (1) are in themselves clear.

It is necessary now to refer to a few of the sections of the Act, as to what matters have to be decided by the court before an order of adjudication is passed. Section 5 enacts that if a debtor commits an act of insolvency, a petition for adjudication may be presented either by a creditor or by the debtor, subject to the conditions specified in the Act. Section 6 lays down those conditions. Clauses 1 and 2 do not call for any observations in this case. Clauses 3 and 4 lay down that the debtor and a creditor, respectively, shall not be entitled to present a petition unless certain conditions are fulfilled. Clause 3, relating to the debtor's application, requires that his debts should amount to Rs. 500 and that either he should have been arrested or imprisoned in execution of a decree or there should be a subsisting attachment of his property for the satisfaction of some decree. Clause 4, relating to the creditor's petition, enacts that the debt due to the petitioning creditor should amount to Rs. 500 and should be a liquidated sum; and further that the act of insolvency on which the petition is grounded should have occurred within three months before the presentation of the petition. As already observed, the debtor should have committed an act of insolvency before a petition could be filed either by him or by a creditor. Section 4 lays down in what cases an act of insolvency would be committed. It is unnecessary to refer to the various acts enunciated in the section. It is enough to refer to Clause (*f*) which says that if the debtor petitions to be adjudged an insolvent under the provisions of the Act that would amount to an act of insolvency. In this case, therefore, the petitioner had committed an act of insolvency and his debts amounted to Rs. 500. He was, therefore, entitled to present the petition.

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Sundara Aiyar J.

The further procedure is laid down in Ss. 12 and 14 to 16. S. 12 provides that a date is to be fixed for the hearing of the petition and notices to certain parties should be issued. Section 14 is of importance for the decision of this case. It lays down that the court shall require proof that the creditor or the debtor is entitled to present the petition, that the required notices have been served, and that the debtor has committed the act of insolvency alleged against him. Other directions are contained in clauses 2 to 4 of S. 14 which I shall return to immediately. S. 15 says that "where the court is not satisfied with the proof of the right to present the petition or of the service of notice, or of the alleged act of insolvency" (of all of which S. 14 requires proof to be adduced) "the petition should be dismissed." Section 16 enacts that where a petition is not dismissed (as required by S. 15 in the cases referred to therein) and the debtor is unable to propose any composition or scheme which shall be accepted by the creditors and approved by the court, the court shall make an order of adjudication. It will be observed, from what has been adverted to thus far, that the matters of which proof is explicitly required by the provisions of the Act are only those set out in S. 14 (1) which have been already mentioned. Are there then any other matters which the court has to find proved before an adjudicating order is made? The appellant's contention is that there are, and reliance is placed on the provisions of Clauses 2 and 3 of S.14 and clause (*a*) of S. 11 (1). The latter section requires that every insolvency petition presented by a debtor shall contain *inter alia* a statement that the debtor is unable to pay his debts. It is argued that it is to be inferred from this provision that the court should find, before an order of adjudication is passed that the debtor is unable to pay his debts. S. 14 (3) says that "the court shall, if sufficient cause is shown, grant time to the debtor or to any creditor to produce any evidence which appears to it to be necessary for the proper disposal of the petition." S. 14 (2) provides that "the court shall also examine the debtor, if he is present, as to his conduct, dealing and property in the presence of such creditors as appear at the hearing and the creditors shall have the right to question the debtor thereon." There is no doubt that both these clauses require that the acts referred to therein should be done on the date when the petition

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for adjudication is heard. But it does not follow that every matter which forms the subject of the examination of the debtor should be decided before an order of adjudication is made. The examination is to be comprehensive with respect to the matters it may embrace. All his conduct and all his dealing with his property are the subject-matter of his examination. In my opinion, the object of this provision as to the public examination of the debtor in England is to obtain information, at as early a stage as possible, of the property and the whole conduct of the debtor in their relations to the insolvency proceedings. They are not all of them necessary for deciding the application for adjudication. They would be material in later stages of the proceedings when the debtor applies for his discharge and then they would be most valuable to enable the creditors to oppose his discharge. What the court has to decide before an order of adjudication, must be gathered from the sections which expressly deal with that point. Again S. 14 (3) certainly requires the court to grant time to the debtor or any creditor to produce evidence in certain cases. In what cases is it to do so? The answer given by the section is, the evidence, for the production of which time is asked for, must appear to the court to be necessary for the disposal of the petition.

The question therefore is, what is necessary for the disposal of the petition? I may add that the debtor or the creditor asking for time must show sufficient cause to induce the court to grant time. That there may be other questions for decision than the mere fact of the commission of an act of insolvency and the service of notices and the right of the creditor or debtor to present the petition, I do not doubt. Thus, in an application by a creditor, the debtor is entitled to show that he is able to pay his debts or there is some other sufficient cause why the court should not make the order.

It has been repeatedly held that the court is entitled to see that proceedings in insolvency are not made an instrument of oppression by the creditor or of dishonest evasion to pay his debts by the debtor. The debtor may also show that he, within a reasonably short time, would be able to enter into an arrangement to satisfy all his creditors. It may also be shown by a creditor that the application for adjudication is really a bogus or sham proceeding.

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Sundara Aiyar J.

It is not desirable that I should attempt to make an exhaustive statement of other reasons which may induce a court not to make an adjudication order.

I am of opinion that the court is to give time for the production of evidence only in the class of cases that I have just indicated. S. 14 does not lend countenance to the argument that the court is bound to decide questions relating to the conduct of the debtor or to the genuineness of the debts mentioned by him in his schedule or to questions relating to his honesty in his dealings with his creditors. Section 11 (1) requires that the debtor, in his petition, should make a statement that he is unable to pay his debts. But it is important to know that none of the Sections 14, 15 and 16 lays down that the court is to decide whether he is able to pay his debts or not, or whether it is to require proof of a statement by the debtor that he is unable to pay his debts. According to the English Bankruptcy Act, 1883, S. 4, a declaration by a debtor that he is unable to pay his debts is itself a commission of an act of insolvency, and S. 8 of that Act provides that a debtor's petition shall allege that the debtor is unable to pay his debts. According to that Act a receiving order is to follow immediately on the presentation of a petition of insolvency by the debtor. The policy of the Provincial Insolvency Act, 1907, departing from that which underlies the provisions of the Civil Procedure Code with respect to insolvency proceedings in mofussil courts, is not to enquire into the whole conduct of the judgment-debtor and the questions relating to his indebtedness at one and the same time. That is what is required by Sections 351 and 352 of the Civil Procedure Code of 1882. The scheme of Act III of 1907 is to make an order of adjudication at first and then to make a full enquiry into all matters connected with the insolvency before the question of the discharge of the debtor is decided. S. 26 of the Act authorises the receiver appointed by the court to apply for the striking out of any debt that may have been improperly entered by the insolvent in his schedule. The concealment of any property by the debtor and omitting it in the schedule may be enquired into under Sections 43 and 44. All these are questions which are considered material in deciding whether an order of discharge should be passed in favour of the petitioner and whether any punishment should be inflicted on him for fraudulent conduct. The matters to be decided at the

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time of adjudication are specified in the sections already referred to, but besides those specific matters, the court has power to refuse to make an order of adjudication on certain other grounds, such as the prevention of abuse of the process of the court and of the unnecessary harassing of a debtor, by a creditor. The question whether all the debts entered in the schedule are real or fictitious is not, in my opinion, one of those matters, nor is the question whether the debtor has concealed property belonging to him by omitting it from his schedule.

The view which I have just expressed is in accordance with the decision of the Calcutta High Court in *Udayachand Maite* v. *Ram Kumar Khara* [1] as also with the judgment of the Allahabad High Court in *Girwardhari* v. *Jai Narain* [2]. In the latter case, the learned Judges disapproved, and rightly if I may say so, of a former decision of another Bench of the same Court.

Two decisions of the Burma Chief Court have been referred to on behalf of the appellant which contain the same view of the scope of the enquiry as that adopted in the earlier decision of the Allahabad High Court and which was dissented from in the later case already referred to.

It is urged that the appellant was not permitted to cross-examine the petitioner at his examination on the date of hearing. But this allegation is unsupported by anything that appears on the record or by any affidavit of the appellant.

Having regard to the observations of the learned District Judge in the court below it may be that the appellant was not allowed to adduce certain evidence that he wished to. But as the matters that he alleged in his petition, and which apparently he wanted to prove by evidence, were not proper to be enquired into at the time of adjudication, the District Judge was not wrong in refusing to go into them at that stage.

I am of opinion that for these reasons the judgment of the lower court is right and I would dismiss the appeal with costs.

Ayling J.—I concur in the order proposed by my learned brother. The chief contention raised on behalf of the appellant is that it was the duty of the District Judge to enquire, and presumably determine, whether the petitioner was or was not able to pay his debts. This is not

1. (1910) 15 C.W.N. 213.   2. (1910) I.L.R. 32 A. 645.

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Ayling J.

a very accurate summary of the allegations contained in the appellant's counter-petition dated 30th June 1908, the actual allegations therein being that the debtor had included fictitious debts in his schedule and concealed one item of property. I can find nothing in the Provincial Insolvency Act which would render it obligatory on the District Judge to enquire into allegations of this nature before passing an adjudication order. Section 14 of the Act compels him to do two things, and two things only. He must satisfy himself on the points marked (*a*), (*b*) and (*c*) in Sub-S. (1), and he must further examine the debtor in the presence of the creditors and allow the latter an opportunity of cross-examining the debtor. The requirements of the law appear to have been complied with in the present case. The only material question here in the three points (*a*), (*b*) and (*c*) is as to the amount of the debts, and we must accept the statement of the learned District Judge that this was admitted by the creditor. It is admitted that the debtor was examined, and it is not shown that the creditor was not given an opportunity of cross-examining the debtor.

The third sub-section referring to the court granting time for the production of evidence is made contingent upon sufficient cause being shown, which is tantamount to saying that it is within the discretionary power of the court.

I would not be understood as saying that the court is precluded from taking evidence and determining other points than those indicated. As pointed out in *Girwardhari* v. *Jai Narain*[1] such a power which may be necessary to prevent abuse of the process of the court may be held to be inherent and may be based on S. 47 of the Act read with S. 151 of the Civil Procedure Code of 1908. It is possible to imagine cases in which so much might be elicited in the course of the examination and cross-examination of the debtor that the court would be well advised to complete the enquiry and dismiss the petition at the preliminary stage. Such cases would, however, be rare and in the majority of cases, as pointed out in the case above-quoted, enquiry into other matters than those which the court is bound to determine would be better postponed to a later stage. Certainly I see no reason to hold that this is one of the exceptional cases.

1. (1910) I.L.R. 32 A. 645.

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The order of the learned District Judge appears to me correct, and I agree with my learned brother that the appeal should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim.

Mankolam Vasudevad Nambudri .. Petitioner* (*1st Defendant*)

v.

Mankolam Sankaran Nambudri .. Respondent (*1st Plaintiff*).

Vasudevad Nambudri v. Sankaran Nambudri.

C.P.C., O. XI, r. 21; O. XVI, r. 20—Striking off defence for non-appearance as witness.

The court has no power, either inherent or otherwise, to strike out the defence of a defendant for failure to appear in time in pursuance of an undertaking given by him to the court for further examination as a witness for the opposite side.

The High Court may not interfere in revision with an interlocutory order under S. 115, C.P.C., but may do so under S. 15 of the Charter Act.

Petition under S. 15 of Act V of 1908 praying the High Court to revise the order of the Subordinate Judge's Court of North Malabar in I. P. 86 of 1911 (O. S. No. 19 of 1910).

T. R. Ramachandra Aiyar for petitioner.

J. L. Rozario for respondent.

The Court delivered the following

JUDGMENT:—With regard to the preliminary objection which has been raised here as to the value, all that I need say is that even if it be doubtful that the court has power to revise the order in this case under S. 115 of the Civil Procedure Code, the order being in the nature of an interlocutory order, there can be very little doubt that I have ample powers under S. 15 of the Charter Act. This has been held in *Puran Mal* v. *Jenki Pershad Singh*[1], *Somasundaram Chettiar* v. *Manika Vasaka Desika Gnana Sambandha Pandara Sannadhi*[2] and C. R. P. 363 of 1910[3].

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* C. R. P. No. 316 of 1911. 29th September 1911.

1. (1901) I.L.R. 28 C. 680.

2. (1907) I.L.R. 31 M. 60.

3. Unreported.

Vasudevad Nambudri v. Sankaran Nambudri.

On the merits of the case I am satisfied that the Subordinate Judge had no jurisdiction to pass an order to strike out the defence of the petitioner. What happened was, the petitioner, who was examined as a witness by the plaintiff, did not attend on the day to which the case was adjourned, although he had given an undertaking to do so. The Subordinate Judge, thereupon, ordered that his defence might be struck off. The only provision under which the defence of a defendant can be struck out is that of Order XI, Rule 21, which empowers the court to strike out the defence of a defendant who fails to comply with an order to answer interrogatories or for the discovery or inspection of certain documents. That rule does not apply in this case. My attention has been drawn by Mr. Rozario to Order XVI, Rule 20. That rule enables the court to pronounce judgment against the party who, being present in court, refuses to give evidence, or who refuses to produce any documents in his possession. Here the defendant was not present in court when the order was passed, and he did not refuse to give evidence or to produce any documents. This rule also has no application. Lastly Mr. Rozario falls back on S. 151 of the Code which says that the provisions of the Code shall not affect any inherent jurisdiction which the court may possess. But he is not able to satisfy me that the court has got inherent jurisdiction to strike out the defence of a defendant who failed to appear in time in pursuance of an undertaking given by him to the court, so that he may be further examined by the other party to the suit, who had summoned him as his witness. The Code provides for ample means of compelling the attendance of witnesses, and if a witness is in contempt, the court has also power to punish him for such contempt. I am of opinion that the Subordinate Judge exceeded his powers in passing the order complained of by the petitioner. I therefore set aside the order dated the 16th March 1911. The respondent will pay the costs of the petition in this court.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Phillips.

Somasundaram Chetty and others	..	Appellants* (*Plaintiffs*)
v.		
Babu *Alias* Ramiah and others	..	Respondents (*Defendants*).

Specific Relief Act, S. 15.—*Injunction in case of trespass—Discretion—Court's duty.*

The granting of an injunction is a discretionary remedy.

Per *Abdur Rahim* J. :—The discretion should be exercised on proper judicial grounds, and injunction is the proper remedy in the case of trespass on land.

Per *Phillips* J. :—Injunction need not necessarily be granted against a trespass under all circumstances, for, in exercising its discretion, the court cannot exclude all consideration as to the extent of damage caused by the trespass.

Where the defendant built up a wall on plaintiff's land, resting it on plaintiff's adjoining wall, and it was found that no actual damage was sustained by the plaintiff, and the lower appellate court found there was encroachment, but did not arrive at an exact finding as to the extent of the encroachment :

Held per *Abdur Rahim* J. :—That the plaintiff was entitled to an injunction. The lower appellate court should have found distinctly the extent of encroachment.

Per *Phillips* J. :—The plaintiff was not entitled to an injunction, especially in view of the difficulty that would be experienced in framing an injunction in a case where the extent of the encroachment has not been proved.

Second appeal from the decree of the District Court of Madura in A. S. No. 111 of 1909 presented against the decree of the District Munsiff of Dindigul in O. S. No. 587 of 1905.

Suit for a mandatory injunction compelling the defendant to demolish 4 inches of his wall to which extent the plaintiff alleged that it encroached on his wall. The first court found that the encroachment was 2 inches and gave a decree accordingly. On appeal the District Judge held that though it was clear that some slight encroachment was made it was not made out how much was the encroachment, that Rs. 10 should be awarded as damages, and that the decree of the lower court in other respects should be reversed. Plaintiff preferred this second appeal.

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* S. A. No. 1499 of 1909. 28th September, 1911.

C. V. Ananthakrishna Aiyar for appellants.

C. S. Venkatachariar for respondents.

C. V. Ananthakrishna Aiyar :—The District Judge who finds that some encroachment was made must find exactly how much was encroached upon. If the appellant was unable to satisfy the District Judge to what extent the Munsif's judgment was wrong in the matter of encroachment, the District Court should not have reversed the Munsif's decree. The fact that the injury to the plaintiffs is very small is irrelevant in a case of trespass as the mixim *de minimus, etc.*, does not apply in such cases—BROOM'S *Legal Maxims*, p. 116; CLERK & LINDSELL on *Torts*, 353. The fact that these houses are situated in a town is no ground for a person encroaching upon his neighbour's land nor is the fact that by a small expense the plaintiff canget rid of the inconvenience done to him by the defendant any consideration—vide *Muthukrishna Aiyar* v. *Somalingamuni Naghendiran.*[1]

C. S. Venkatachari :—The trespass has been found to be very little. In fact the plaintiff's evidence itself and the District Judge's finding are that half an inch has been encroached upon; *i. e.*, that the plaster of the plaintiff's wall was scraped off so as to make defendant's wall fit in with the plaintiff's wall without leaving any room for rain water, etc., to get in in the middle so as to cause injury to both the walls. When the injury is very small the rule in India is not to grant an injunction but only to give damages—S. 54, Specific Relief Act ;*Rewa* v. *Vrejvalell* [2]; *Gansham* v. *Moroba* [3] and *Boyson* v. *Deane* [4].

[*Abdur Rahim* J.—The Bombay cases are only of easement.]

C. V. Ananthakrishna Aiyar in reply :—The Madras case was not applied in *Muthukrishna Aiyar* v. *Somalingamuni Naghendiran*[1].

The Court delivered the following

JUDGMENT :—*Abdur Rahim* J. :—The suit was to obtain a decree directing the defendants to demolish at their cost the wall built by them on the plaintiff's wall and a permanent injunction restraining the defendants from interfering in any manner with the plaintiff's wall and also for damages. The District Munsif found that the defendants had cut away about two inches

1. (1911) 21 M. L. J. 742.
2. (1903) 6 Bom. L. R. 41.
3. (1894) I. L. R. 18 B. 474, 488.
4. (1898) I. L. R. 22 M. 251, 253.

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Rahim, J.

of the breadth of the plaintiff's parapet wall on the northern side between the points C and D in the commissioner's plan down to a certain depth and along a length of about 16 feet and built their parapet wall resting it to that extent on the rest of the plaintiff's parapet wall and on the main wall of the plaintiff's house on which the plaintiff's back wall stands. In accordance with that finding the Munsif granted an injunction directing the defendant to remove the wall to the extent of the encroachment and also restraining them from further interfering with the plaintiffs, wall in question. He also found that no actual damage had been sustained by the plaintiffs and disallowed the plaintiffs' claim for damages.

In appeal the District Judge was of opinion that even on the facts found by the Munsif the plaintiffs were not entitled to injunction, mandatory or prohibitive, because the defendants have at most committed a technical trespass by which no inconvenience whatever is caused to them and therefore all that the plaintiffs are entitled to is nominal damages.

The District Judge, in my opinion, is quite wrong in his view of the law. What is urged in support of this view is that injunction is a discretionary remedy and should not be granted even in a case of trespass when no damage has been caused or the damage caused to the plaintiff is so small as to be negligible. Now there can be no doubt that injunction being a remedy in equity, the court is vested with a discretion to grant or to refuse it according as the equity of the particular circumstances of a case may require. But that discretion has to be exercised on proper judicial grounds. Here is a case of continuous trespass practically amounting to ouster of the plaintiff from the land encroached upon, which it is found is the property of the plaintiffs and was in their possession at the time of encroachment. The plaintiffs are entitled to possession of the land free from the encroachment. What would be their remedy at law? Ejectment, and also damages, if any, and not merely damages as appears to be assumed by the learned Judge, which assumption is also the basis of the arguments advanced in support of his judgment.

In addition to ejectment the plaintiffs would also be *prima facie* entitled to damages at least to the extent of the costs

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which have to be incurred to remove the structure if they did not prove any other damage. There may be cases of continuous trespass on a man's land in which no actual and present damage can be proved, but I see no warrant for the position that merely because no damage is proved therefore a trespasser cannot be ejected. Suppose I have a piece of waste land and a person with no sort of excuse or justification wrongfully takes possession of it and erects a building thereon without my knowledge, could it be said that I should not be allowed to eject the trespasser, because the land was bringing me no income. I am unable to show that I sustained any actual and present damage by the trespasser building on it. Let us go further and suppose the trespasser wishes to pay me a handsome rent and I choose to refuse it. To say that in such a case I should not be entitled to recover possession of my land would be striking at the foundation of rights of property. And yet that is the logical result of the view held by the lower appellate court which the pleader for the respondents has strenuously supported. In a case like this the question might well be raised whether the proper remedy is ejectment or injunction, but the respondents, for obvious reasons, raise no such question, for they would not be better off if the court granted ejectment. In fact, as between ejectment and mandatory injunction, the latter would be more favourable to the respondents, for they might try, if possible, to remove so much of their wall as rests upon the plaintiffs' wall without destroying the rest of it, or they might perhaps remove the encroachment at a less cost than would be incurred by the appellants.

The vakil for the respondents has relied upon the well-known cases which lay down the general proposition that the court would not ordinarily grant mandatory injunction if damages would be adequate remedy, of which *Benode Coomaree Dossee* v. *Soudamoney Dossee*[1] and *Boyson* v. *Deane*[2] are examples. This rule is embodied in Ss. 54 and 55 of the Specific Relief Act. I may mention that it is not necessary to consider in this case whether there is any substantial difference between the law enacted in those sections and the rule of English law on the point as suggested in *Boyson* v. *Deane* [2]. I am inclined to doubt whether there is any such difference, but it is not necessary to

1. (1889) I.L.R. 16 C. 252. 2. (1898) I.L.R. 22 M. 251.

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decide that point in this case because it was found by the District Munsif that there was no acquiescence or delay on the part of the appellants and that finding was not impugned in the appeal to the District Judge.

I must therefore accept that finding as final for the purposes of this appeal. In this case, therefore, which is one of continuous trespass, where the defendants' action has no justification or excuse and the plaintiffs have not been guilty of any laches or delay in coming to court as the finding is and the facts amply show, the proper remedy is injunction and mere damages would not obviously be an adequate remedy. The fact that no actual damage can be shown is in itself a good ground in cases of this nature for the granting of injunction. I may also observe that the necessity for injunction becomes all the greater and not less by reason of the fact that the defendants had, before the wall in dispute was built, encroached to a small extent at another part of plaintiffs' parapet wall by another wall running north to south built by the defendants.

The finding of the District Judge as to the extent of the encroachment cannot be said to be satisfactory. The District Munsif found that it was two inches. The District Judge in paragraph 2 of his judgment says that this finding is open to doubt. In paragraph 3 he says that it would appear that the encroachment was half an inch along the line CD. In paragraph 4, he suggests that the encroachment was two inches and in paragraph 5 he concludes by saying that there has been some slight encroachment but that the extent of the encroachment has not been clearly made out. It may be that what the learned Judge means is that while, in his opinion, the encroachment cannot be less than half an inch, he is unable to hold positively either that it is two inches as found by the District Munsif or that it is not two inches. But this is not made clear. As an appellate court the way he ought to have regarded the questio was whether the finding of the District Munsif on the point was wrong. If he was unable to hold that the finding was wrong, his duty was to confirm such finding. Further the District Judge having found that there was some encroachment he ought to have found what, in his opinion, was the least extent of the encroachment if he could not find the exact extent of the encroachment.

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I may observe that the maxim *de minimis non curat lex* has no application to the law of trespass. See CLERK and LINDSELL on *Torts*, 4th Edition, page 343.

I should, therefore, direct the District Court of Madura to submit a fresh finding, having regard to the above observations, on the question: "To what extent has the defendants' wall been built on the plaintiffs' parapet wall between the points C and D in the Commissioner's plan?"

As my learned brother is for confirming the judgment of the lower appellate court this appeal is dismissed with costs under S. 98, Civil Procedure Code.

Phillips J.—This is a case of trespass upon the plaintiffs' wall. The District Munsif gave a mandatory injunction but the District Judge set aside his decree and awarded Rs. 10 damages. In cases of trespass upon immoveable property a plaintiff is generally considered to be entitled to an injunction and not merely to damages but the circumstances of this case are somewhat peculiar. The first defendant is said to have built a wall extending over a portion of the plaintiffs' wall. The District Munsif found that there was an encroachment to the extent of two inches but the District Judge has found that the plaintiff has not proved the actual extent of the encroachment although he appears to think that the encroachment is half an inch wide. Some time before the suit wall was built the defendant had built a wall north to south which appears to have encroached upon the plaintiffs' wall to some extent and the Commissioner reports that the present wall does not extend further than that wall, to which the plaintiff took no objection. It has also been found that the plaintiff has not suffered material injury. In view then of the difficulty that would be experienced in framing an injunction in a case where the extent of encroachment has not been proved, I think this is a case where an injunction should be refused. It does not appear that the plaintiff took any action until the work was completed and a court will rarely interfere to pull down a building which has been erected without complaint—*Gaskin* v. *Balls*.[1] That was no doubt a case of breach of covenant and not of trespass upon immoveable property, but as the court is vested with a discretion under S. 54 of the Specific Relief

1. (1879) 13 Ch. D. 324 at p. 329.

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Act it cannot be contended that an injunction must necessarily be granted against a trespass under all circumstances, for in exercising its discretion the court cannot exclude all consideration of the extent of damages which would be caused to either party by refusing or granting the injunction. Vide *The Shamnugar Jute Factory Co.* v. *Ram Narain Chatterjee* [1] and *Benode Coomaree Dossee* v. *Soudamoney Dossee* [2]. In this case I think the District Judge rightly refused an injunction and I would dismiss this appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

T. N. Muthuveerappa Chetti *alias*
T. N. Batcha Chetty and another ... Appellants*
(*Counter-Petrs.*)

v.

T. R. Ponnusawmy Chetty ... Respondent
(*Petitioner.*)

Batcha Chetty v. Ponnusawmy Chetty.

Guardianship—Minor—Considerations for court—Welfare of minor.

The texts of Hindu Law do not recognize any absolute rights of guardianship in any one, the sovereign being entrusted with the guardianship of all minors and being, therefore, entitled to appoint any person as guardian in their interests. The question for consideration in applications as to guardianship of a minor is *prima facie* the welfare of the minor; and in cases where it is not possible to consult the minor's wishes owing to the minor's tender age, it is the duty of the court to come to is own conclusion as to what would best promote the minor's interests.

Held that in the circumstances of the case, where, among other factors for consideration, the father of the minor was residing outside the jurisdiction of the court, the maternal grandfather and the maternal grandmother were preferable guardians to a motherless minor five years old to the minor's own father, who had married a second time.

On appeal from the order of the Hon'ble Mr Justice *Bakewell* dated the 27th of September 1911 in the Ordinary Original Civil Jurisdiction of this Court in O. P. 87 of 1911.

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1. (1886) I.L.R. 14 C. 189.
2: (1889) I.L R. 16 C. 252.

* O. S. A. No. 32 of 1911. 20th October 1 1.

Batcha Chetty v. Ponnusawmy Chetty.

This was an appeal against an order declaring the father guardian of a minor daughter aged five years and ordering custody to him as against the counter-petitioners, the maternal grandfather and the maternal grandmother. The mother of the minor died in December 1907 and the petitioner married a second wife some months later.

T. Ethiraja Mudaliar for appellant.

M. N. Doraiswami Aiyangar for respondent.

T. Ethiraja Mudaliar :—The child ever since its birth was living with the counter-petitioners.There is no female in the petitioner's house to look after the girl. The counter-petitioners' father has made a gift of a house worth Rs. 1,000 to the girl's mother. The petitioner is poor on pay of Rs. 20 a month. I wanted to cross-examine the petitioner as regards the facts of the affidavit. That was refused and the petition disposed of on the affidavits. The petitioner and his deceased wife were not getting on well. The welfare of the minoralone is to be looked to. Even a father will be ignored in favour of others who can take better care of the minor. Mere blood-relationship is no test. The presumptive reversioner ought not to be appointed. Moreover the petitioner is a permanent resident of Bangalore and will not be amenable to the jurisdiction of this court. He is not suing but only petitioning under the Act which gives a discretion to the court. I rely on *Krishnasawmi Chetty* v. *Colla Mangamah*[1] ; *Sami Rao* v. *Eliawatha Rao*[2]; *Muthuswami* v. *Narayana*[3]; *Re. Gulbai and Sulbai*[4]; *Bindo* v. *Sham Lal*[5], *Tota Ram* v. *Ram Charan*[6], and TREVELYAN, p. 101, on the necessity of guardian residing within the jurisdiction.

M. N. Doraiswami Aiyangar.—The petitioner has a sister in his house. [*Sundara Aiyar* J.—That does not appear from the affidavits.] The mere fact that the petitioner has married again is no disqualification. The rule that the next heir should generally not be appointed should have no force in the case of a father. There was no reply to my notice sent long ago. *Kalidas* v. *Subbamma*[7] . Shows that strong grounds must be shown to deprive a natural guardian of his legal rights.

1. (1911) M.W.N. 365.
2. (1905) 16 M.L.J. 357.
3. (1910) 21 M.L.J. 195.
4. (1907)I.L.R. 32 Bom. 50.
5. (1906) I.L.R. 29 A. 210.
6. (1910) I.L.R. 33 A. 222.
7. (1885) I.L.R. 7 M. 29.

Bâtcha Chetty v. Ponnusawmy Chetty.

The Court delivered the following

JUDGMENT:— This is an appeal from the order of *Bakewell* J. in an application by the respondent to be declared the guardian of his minor girl aged about five years. The petitioner is living in the Civil and Military Station, Bangalore, and the child at the time of the application was and now is in the custody of her deceased mother's mother and father living in Madras. The learned Judge bases his order on the only ground that nothing was shown "disqualifying the respondent either in his conduct or in his opinion from having the custody of his child."

It would appear that the learned Judge treated the application as one to enforce the petitioner's legal right to the custody of his child and as similar to an action to recover the child from the appellants. The appellants, the child's maternal grandfather and maternal grandmother, alleged in their affidavits that the petitioner and his wife (now deceased) had not been getting on well for some time before her death, that she had been living with her husband, the respondent, at Bangalore till May 1906, that she then came over to Madras apparently for her confinement, and while she was here the respondent instituted a suit against her for restitution of conjugal rights and another against her parents for the recovery of his wife. There was also criminal proceedings in which he charged his wife and her parents with theft. The child was born in September 1906. After the death of the wife the petitioner demanded the restoration of the child by a lawyer's notice, but the appellants sent no reply to it. This was in December 1907. The present application for being declared guardian of the minor was in May 1911. The respondent stated in his affidavit that he made one or two attempts to see his wife and child but the appellants would not allow him to see them.

We may at once say that we agree with the learned Judge that no serious misconduct is proved against the respondent. But the question we have to decide is whether it is for the welfare of the minor that the respondent should be declared or appointed her guardian. Recent decisions of the High Court have established the principle that in an application of the kind in question, the welfare of the child is the paramount consideration although 'regard must also be had to the recognised rigts of

Batcha Chetty *v.* Ponnusawmy Chetty.

guardianship under the law.' As a matter of fact the texts of the Hindu law do not recognise any absolute rights of guardianship in any one, the sovereign being entrusted with the guardianship of all minors and entitled to appoint any person as guardian in their interests. *Re. Gulbai and Sulbai*[1], *Bindo* v. *Sham Lal*[2] and *Tota Ram* v. *Rama Charan*[3], all recognised the principle that the welfare of the minor is the first consideration to be borne in mind. It has also been affirmed in the decisions of this Court in *Krishnasawmi Chetty* v. *Colla Mangammah*[4], *Muthuswami Sastri* v. *Narayana Sastri*[5] and *Sami Rao* v. *Eliawatha Rao*[6]. The case in *Bindo* v. *Sham Lal*[2] is very similar in its facts to the present case. Mr. Justice *Bakewell* distinguishes these cases on the ground that it was possible in some of them to consult the wishes of the minor and that the court acted in accordance with the minor's wishes, but that it is not possible to do so in this case as the minor is only five years old. But we do not think that this would enhance the rights of the respondent. It would make it the duty of the court to come to its own conclusion as to what would best promote the minor's interests. It does not appear that excepting the respondent's wife there is any female relation living with him competent to take proper care of the child. It would be hardly safe to presume that his wife, the child's step-mother, would be willing to do so. On the other hand the grandmother with whom the child has been living till now might be trusted to take good care of her. The maternal grandfather's father has made a gift of a house in favor of the child's mother to which the child has now succeeded. There is good reason for believing that the maternal relations have strong affection for the child. We cannot also ignore the fact that the respondent, who as a fact has never seen the child, was not during the last years of his wife's life on the best terms with her. It was also urged for the appellants that the respondent would be next heir to the child's property but we should not attach much importance to this fact in the case of a father applying to be declared the guardian of his child. It also appears that the respondent is not a person possessed of ample means though we do not suggest that he would not be able to bring up the child properly.

1. (1907) I.L.R. 32 Bom. 50.
2. (1906) I.L.R. 29 All. 210.
3. (1910) I.L.R. 33 All. 222.
4. (1911) M.W.N. 365.
5. (1910) 21 M. L. J. 195.
6. (1905) 16 M. L. J. 357.

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The claims of persons recognised as having preferential rights of guardianship have not been recognised in several of the cases referred to above where the Court came to the conclusion that the best interests of the child did not lie in their being declared or appointed guardians. The petitioner himself is residing beyond the limits of the jurisdiction of this court and it would not be very easy for the court to control his conduct as guardian. The application is one which the court is not bound to grant unless it is satisfied that it is for the welfare of the child that an order should be made.

In all the circumstances of the case we are of opinion that the application of the respondent should not have been granted. We therefore reverse the order of the learned Judge and dismiss the application with costs both here and before the learend Judge.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Phillips and on a difference before Mr. Justice Benson.

G. G. Jeremiah .. Appellant*
v. (*Accused*)
F. S. Vas .. Respondent
(*Complainant*).

Jeremiah *v.* Vas.

Cr. P. C., Ss. 423, 428—*Additional evidence—When to be called for?—Retrial, when ordered—Prosecution for libel—Proof of publication and publisher necessary—Evidence Act, S.* 81—*Presumption.*

In a prosecution for defamation, it is incumbent on the prosecution affirmatively to prove that the accused published the libel complained of. The omission of the accused to deny the publication in any written statement he may have tendered cannot be urged by the prosecution in answer to the complaint of want of necessary proof by the prosecution; and where the libel complained of is one contained in a newspaper, there can be no conviction without legal proof that the accused was the printer and publisher of the newspaper.

The presumption of the genuineness of a newspaper, under S. 81 of the Evidence Act, does not include a presumption that it was printed and published by the person by whom it purports to be.

Per *Sundara Aiyar* J.:—The language of S. 428, Cr. P. C., seems to indicate cases where, there being already evidence on the record, the court considers it to be unsatisfactory or where the evidence on record leaves the court in such a state of doubt that it considers necessary, to enable it to decide the case, to have further evidence. It does not appear to be applicable where the prosecution had ample opportunities to produce evidence and had failed to do so.

Per *Phillips* J. (*Benson* J. concurring):—S. 428, Cr. P. C., merely says that evidence may be taken when "necessary" and in each case the necessity must be determined on the particular facts of the case. Where the court itself was mistaken as to the sufficiency of the evidence on record and framed a charge in the opinion that a *prima facie* case of publication was made out, it is a proper case to direct additional evidence being taken.

It is not enough that the prosecution by its own negligence failed to produce evidence which it was its duty to do.

In order to justify an order for a retrial it is necessary that the court should come to the conclusion that the trial was not held properly for some reason or other.

Per *Sundara Aiyar* J.:—The power to direct a retrial is not confined to cases where the trial was held by a court having no jurisdiction. A retrial may be ordered where the trial is held to be illegal on the ground of misjoinder of charges; where evidence is improperly rejected by the lower court, or where, though the accused was rightly acquitted of one offence, the appellate court comes to the conclusion that he ought to have been tried

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* Cr. Appeal No. 194 of 1911.

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for another offence and in every case of irregularity in the trial such as where persons who ought not to have been tried together have been so tried.

Appeal from the judgment of the Court of the District Magistrate and Justice of the Peace, Civil and Military Station, Bangalore, in Cr. C. No. 20 J. P. of 1910.

E. R. Osborne and *M. K. Nayanasawmi Aiyar* for appellant.

S. Swaminathan for complainant.

P. R. Grant for Public Prosecutor.

E. R. Osborne:—In this case, there is no proof of publication. All that we have is, a paper which purports to be printed by Jeremiah. Admission by the accused that he is the publisher of the paper is useless. The case for the prosecution cannot be supplemented by the admissions of the accused in his examination by the court—*Emperor* v. *Chinnappayan*,[1]; *Mohideen Abdul Khadir* v. *Emperor*[2]; *Basantakumar Chattack* v. *Empress*,[3] S. 271, Cr. P. C., contemplates only pleading guilty or not pleading guilty. There is no such thing as confession and avoidance and burden of proof in criminal cases. If the accused does not plead guilty but admits the facts and pleads an exemption, the plea is still one of not guilty and the prosecution is bound to prove the facts admitted notwithstanding the admission by the accused.

Swaminathan:—S. 81 of the Evidence Act covers this case. Anyhow, it is a mere technical plea. Under the ample powers conferred by S. 428, this court can direct the taking of evidence. The Privy Council decision in *Kassavji Iswar* v. *G. I. P. Railway Company*[4] does not apply to criminal cases; he referred to Ss. 428 and 540, Cr. P. C., and *In re Laxuman Shanabhogue*[5].

E. R. Osborne:—S. 81 refers to official documents and not private newspapers. As for letting in evidence at this stage, this is a private prosecution and the courts ought not to interfere so as to make up for the negligence or carelessness of the prosecutor. This is a private prosecution standing on the same footing as a civil case and the same rules only as are applied in civil cases ought to be applied.

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1. (1906) I. L. R. 29 M. 372.
2. (1903) I. L. R. 27 M. 238.
3. (1898) I. L. R. 26 C. 49.
4. (1907) I. L. R. 31 B. 381.
5. (1910) 8 M. L. T. 418.

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The Court delivered the following

JUDGMENT:—*Sundara Aiyar* J.—This is an appeal by the accused in C. C. No. 20 of 1910 in the Court of the District Magistrate and Justice of the Peace, Bangalore. He was convicted of libelling the complainant by publishing in a Journal named the "Army and Civil News" on the 28th September 1910 what purported to be a report of the proceedings in a civil suit in the Court of the District Judge of Bangalore. The defendant in that suit was the uncle of the complainant, an Advocate of the Bangalore Court, who appeared for his uncle as counsel. The suit was for rent due by that defendant for a house. The report contained the following statement:—"His Honour facetiously remarked that the uncle, the Dental Surgeon, (that is, the defendant in the suit) and the lawyer nephew, both combined, wanted to deprive the plaintiff of his rent by shifting the responsibility on to the shoulders of the other nephew, the Dental Surgeon, who is now in Goa and beyond the reach of the "arms of the civil law." Two days after the publication of this report a correction appeared stating that it was not "His Honour" that made the remark but Mr. Saldanha, the counsel for the plaintiff in the suit.

At the trial in the lower court the accused maintained that, notwithstanding the mistake mentioned above, the report was substantially correct and that it was a privileged statement made without malice. The lower court held on various grounds that the report was not substantially correct and further found that it was extremely improbable that the remark was made at all by Mr. Saldanba and that there was evidence of malice in the tone of the report and of the correction notice.

On appeal the contention that the report was substantially a correct one was repeated; but I have no doubt that no privilege can be claimed for a mistake so palpable as the one that was admitted in this case and that the publisher published the statement attributed to the Civil Judge at his own risk. The main contention in the appeal is that there is no legal evidence in the case that the accused published the libel complained of, and that the prosecution altogether failed to adduce evidence that the accused published the issue of the 28th September 1910 of the "Army and Civil News" in which the libel appeared or that he was the publisher of the journal known by that name. This

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contention I find to be well founded. A copy of the issue of the paper containing the libellous statement was put in. Besides this, the only evidence of publication by the accused given after the accused appeared before the court, was the statement by the complainant in examination-in-chief "I have complained about the article marked Exhibit A in the 'Army and Civil News' which appears to be printed and published by Mr. G. G. Jeremiah." This does not amount to a definite statement either that the accused published the article in question or that he was the editor and publisher of the journal, whether the sentence, as contended by Mr. Osborne, means only that the particular issue of the journal put in bore the statement that it was printed and published by Mr. Jeremiah, or whether, as contended by Dr. Swaminathan, the article or the journal appeared to the witness to be one printed and published by Jeremiah. In the petition of complaint put in by the complainant it is stated that the accused reported the case in the "Army and Civil News." The complaint was no doubt sworn to by Mr. Vas, the complainant. But the statement was not made in the presence of the accused and could not be taken as evidence against him. There is no explanation, given why it was not repeated in the complainant's deposition at the trial. It is contended that the accused never denied that he was the printer and publisher of the "Army and Civil News," or that he published the issue of the 28th September 1910 containing the libellous statement, and that as a matter of fact he admitted the fact before the lower court in the written statement put in by him. But I am unable to find any such admission in that statement. Paragraph No. 3 thereof says "what was published was a substantially true report without any malicious intention." There is no admission here that it was the accused that published the statement. It is in all probability true that the accused did not deny that he published the libel. This is not sufficient. It is incumbent on the prosecution affirmatively to prove that the defendant published the libel complained of, as that was one of the essential facts necessary to establish the guilt of the accused. It is unnecessary to consider whether, if such admission were contained in the accused's written statement, that would relieve the prosecution from the defect in letting in

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evidence of publication. *Mohidin Abdul Kadir* v. *Emperor* [1]; *Emperor* v. *Chinnapayan* [2]; *Basanta Kumar Ghattak* v. *Queen-Empress* [3] are authorities in support of the appellant's contention that such an admission by the accused made in answer to questions put by the court under S. 342, Criminal Procedure Code, could not be utilized by the prosecution to fill up a gap in its own evidence. No doubt an admission by the accused may be proved in a criminal case just as much as an admission by the defendant in a civil suit under S. 21 of the Evidence Act. But an admission under that section is one made by the party against whom it is tendered before the proceedings in which it is sought to be given in evidence. It does not refer to pleadings in the case or to an admission contained in such pleadings. The accused in a criminal case may plead that he is guilty or not guilty. See Ss. 255 and 256, 271 and 272, Criminal Procedure Code. But there are no pleadings in a criminal case similar to those in civil proceedings which are conclusive against the party making them. The prosecution has to prove all the facts necessary to constitute the offence charged against the accused. If it fails to do so, no charge could be framed at all against the accused in a warrant case, and in sessions cases the court should, when the case for the prosecution has been closed, acquit the accused where no evidence of any of the links necessary to establish the offence has been adduced by the prosecution. It is clear, therefore, that the appellant's omission in his written statement before the lower court to deny the publication, or any inference of his intention not to deny it, cannot be urged by the prosecution in answer to the appellant's contention of no evidence of publication. It is contended that under S. 81 of the Evidence Act the court is bound to presume the genuineness of every document purporting to be a newspaper or a journal, and that inasmuch as Exhibit A in the case bears the name of the accused as the printer and publisher, the presumption of its genuineness would include a presumption that the accused is the printer and publisher of Exhibit A, and that therefore it was unnecessary for the complainant to let in any evidence of the publication of Exhibit A by the accused. Mr. Obsborne for the appellant contends that the section

1. (1903) I.L.R. 27 M. 238. 2. (1906) I.L.R. 29 M. 372.
3. (1898) I.L.R. 26 C. 49.

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applies only to public documents, and that in any event it provides only that the court should presume that a document purporting to be a newspaper or journal is that it is the particular newspaper or journal and not that it was printed or published by a particular person. His first contention appears to be supported by a note of Messrs. Ameer Ali and Woodroffe in their *Commentaries on the Evidence Act*, 4th Ed., p. 425, that the section refers to public decuments, but it is very doubtful whether the language of the section supports it. If punctuation may be taken to throw any light on the question, the existence of a comma after the word 'Journal' is against the appellant's contention. Even otherwise, the natural import of the words of the section does not appear to favour the view that the phrase "printed by the Queen's printer" not only qualifies the expression "private Act of Parliament," but also "newspaper or journal." It is, however, unnecessary in this case to discuss the quession further, as I am of opinion that the presumption of the genuineness of a newspaper does not include a presumption that it was printed and published by the person by whom it purports to be. Such apparently is not the English law. According to that law the proper way to prove the publication of a libel, where evidence is not given that a particular paper complained of was published by the accused, is to prove the statutory declaration made by the accused that he is the printer and publisher of the journal in question. In *Gathercole* v. *Miall* [1] the plaintiff sought to prove that the defendant published several copies of a newspaper called the "Nonconformist." That the defendant was the editor and publisher of the journal of that name appears to have been admitted. The plaintiff's object in proving the publication of many copies was to show the extent of damages sustained by him. A person of the name of Brookes was called, who stated that he was the president of a literary association consisting of 80 members, that he saw at the institution office a copy of the issue in question, that he believed that the copy had been lost or destroyed, that he believed it to have been a copy of the paper produced in evidence and bore the same heading, namely, "Nonconformist," and that it contained the libellous article complained of. Objection was raised to the reception of secondary

1. (1846) 15 M. & W. 319.

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evidence of the contents of the paper that the witness had seen. *Parke*. B was of opinion that, as the defendant had been proved by the regular satisfactory evidence to be the printer and publisher of the paper, the witness's evidence that the copy he saw was similar to the one produced in court was sufficient to show that it was published by the defendant. The learned Judge observed: "There was general evidence that it was a paper called the "Nonconformist" containing, according to the best of the witness's recollection, the libel, the subject of the action. I thought that was ample evidence to show that one of the copies of the newspaper, of which the defendant was the publisher, and of which of course he did not print one copy but many, had been sent by some person not the defendant, to that room." *Pollock* C. B. observed: "But then it is said that this paper is not proved to have been issued by the defendant; that is a question entirely for the jury; and I think there is evidence to prove that this was one of the copies printed at the same time with the libel which is laid before the jury. It is not like the publication of a written libel. The jury must be aware that many copies of a newspaper are issued at the same time and they are issued for the purpose of publication and distribution. No doubt a suggestion may be made that the plaintiff in order to enhance the damages may have procured some papers to be printed. The jury are to consider whether that is a reasonable suggestion or not. There was some evidence for the jury to consider; and I think the reasonable conclusion is, that this paper was originally issued by the defendant." *Alderson* B. said: "Now we must consider what the nature of the instrument is. It is a copy of the newspaper. We must use our own common sense, and remember that with respect to newspapers, not one copy, but a great variety of copies, are published for general circulation among the public at large. If you compare the instrument in one or two parts and find the one is an exact copy of the other, you would have no difficulty in saying it was printed from the same materials and from the same type. * * * So I say here with respect to a newspaper: if you find it in general corresponds, it is evidence from which the jury may infer that the newspaper is printed from the same type as the paper which is produced; and if so, it is printed by the defendant." It will be observed that in that case it was proved that the defendant

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was the publisher of the journal called the "Nonconformist." Proof was given that one copy of the issue in question produced before the court was in fact issued by the defendant. Some similarity between that copy and the copy seen by the witness (Mr. Brookes) was also proved by him. It was held that this was evidence sufficient to go to the jury that the copy seen by the witness was also published by the defendant. In my opinion the object of S. 81 of the Evidence Act, taking it to refer to every newspaper, is to dispense with evidence of two out of the three facts proved in that case provided the first is proved, *viz.*, that the defendant is the publisher of the newspaper. The court is then to presume that what purports to be a newspaper of a particular name is that paper, and that every copy of it was issued by the publisher of that paper. According to S. 7 of Act XXV of 1867 the production of an authenticated copy of a declaration made under that Act is admissible to prove that the person mentioned in the declaration is the publisher of the journal to which the declaration relates. Section 81 would apparently authorise and require the court to presume that any document purporting to be a copy of the journal in question is in fact such and this would prove that the declarant under Act XXV of 1867 is the publisher of the paper produced in court. The case of *R.* v. *Forsyth*[1] would seem to show that the presumption extends no further with regard to the *London Gazette*, which also is to be presumed to be genuine under S. 81 of the Evidence Act. The reporters say: "The Judges seem to think that the production of the *Gazette* would be sufficient without proof of its being bought of the *Gazette* printer, or where it came from." In an earlier case, *Watts* v. *Fraser*,[2] deposit of a copy of a newspaper at the stamp office as required by the statute is not sufficient evidence that others of that kind were circulated. This is not in accordance with the view taken in *Gathercole* v. *Miall* [3]. In WIGMORE on *Evidence*, Vol. III, S. 2150, the learned author says with regard to the mode of proving the defendants' publicaiton of a newspaper: "Here the process would be to bring home to him the issuance on that day of a certain copy (either by the testimony of one who bought at an office proved to be the defendant's or by some statutory method); then the identity

1. (1814) Russ. & R. 274. 2. (1837) 7 Ad. & E. 223.
3. (1846) 15 M. & W. 319.

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between that copy and the one read by the person to whom it is complained to have been communicated will suffice as evidence that the two issued from the same press, *i. e.*, from the defendant's.". Again the learned author says in 2151: "The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be published by the Government has led to a general concession, by judicial decision or by statute, that such purporting publications, at least when in the form of the standard official documents constantly issued and referred to, are to be assumed genuine. Two principles, however, are in fact usually involved, first, the admissibility of a copy proved to be printed by official authority, as hearsay evidence of the contents of the original, and, secondly, the presumption of genuineness of a particular printed document purporting to be of such official origin. The two questions are seldom separate, either in decisions or in statutes." The author points out in a note that the distinction was recognized in *R.* v. *Forsyth* [1] already referred to. The question whether the copy of a Government Gazette or any other publication can be treated as evidence of the contents of the original is not one relating to the proof of documents but to the admissibility of secondary evidence. The other sections contained in the chapter headed "Presumptions as to Documents" seem to support the same conclusion. Section 87 provides, in the case of certain books produced in evidence, that "the court may presume that they were written and published by the person and at the time and place by whom or at which it purports to be written or published." Section 90 provides specifically that where a document purporting or proved to be 30 years old is produced from proper custody, the court may presume the signature and every other part of such a document which purports to be in the handwriting of any particular person, is in that person's handwriting and in the case of a document executed or attested that it was duly executed and attested by the persons by whom it purports to be executed or attested. Section 81 does not expressly lay down that the court is to presume that a document purporting to be a newspaper was printed and published by the person by whom it purports to be. Section 79 provides for a presumption not only that certain certificates

1. (1814) Russ & R. 274.

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or certified copies are genuine but also that the officer purporting to sign or certify held that character when he signed or certified. Section 80 also makes a distinction between the genuineness of a document and the truth of the statements as to the circumstances under which the record or memorandum to which that section relates was made. Section 7 of Act XXV of 1867 expressly provides the mode of proving that a particular person is the printer and publisher of a newspaper. On the whole it appears to be clear that the complainant cannot ask the court to presume that the appellant is the printer and publisher of the "Army and Civil News." He could easily have proved the fact by producing a copy of the appellant's declaration made under Act XXV of 1867. He failed to do so. The result is that the appellant's contention that there is no legal evidence to prove the publication of the libel must be upheld, and the conviction of the appellant cannot be sustained.

Dr. Swaminadhan who appears for the complainant asks us to direct additional evidence to be taken under S. 428, Criminal Procedure Code. But, in my opinion, that section does not enable us to do so in this case. It provides that "the appellate court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself or direct it to be taken, etc." It requires that the appellate court should consider additional evidence to be *necessary*. The language seems to indicate cases where, there being already evidence on the record, the court considers it to be unsatisfactory or where the evidence on record leaves the court in such a state of doubt that it considers it necessary to enable it to decide the case to have further evidence. See the case of *Woodoy Chand Mookhopadhya* [1]. At any rate it does not appear to be applicable where the prosecution having had ample opportunities to produce evidence has failed to do so. No reason is given in this case why evidence of publication of the libel was not given. The prosecutor had no right to expect the accused to waive the proof of any fact, assuming that such waiver could be availed of by him. Moreover the case is not one in which I can say the interests of public justice would justify the use of the provisions of S. 428, Criminal Procedure Code. I must therefore decline to accede to Dr. Swaminadhan's request.

1. (1872) 18 W. R. (Crl). 31.

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It remains to consider what is the proper order to pass in the case. It appears to me that this is not a proper case for directing a retrial. Section 423, Criminal Procedure Code, provides that in an appeal from a conviction the court may "reverse the finding and sentence and acquit or discharge the accused or order him to be retried by a court of competent jurisdiction subordinate to such appellate court or committed for trial." An order for retrial would be proper where the trial was illegal, irregular or defective. I agree with the Calcutta High Court that the power to direct a retrial is not confined to cases where the trial was held by a court having no jurisdiction. See *Kumudini Kanta Guha* v. *The Queen-Empress* [1] where it was held by *Prinsep* and *Handley* JJ. that a retrial may be ordered where the trial is held to be illegal on the ground of misjoinder of charges. A retrial would be proper also where evidence is improperly rejected by the lower court or where, though the accused was rightly acquitted of one offence, the appellate court comes to the conclusion that he ought to have been tried for another offence. Such an order may also be made in every case of irregularity in the trial, such as where persons who ought not to have been tried together have been so tried. It would seem to be necessary that the court should come to the conclusion that the trial was not held properly for some reason or other. It appears not to be enough that the prosecution by its own negligence failed to produce evidence which it was its duty to do. In a case similar to this the learned *Chief Justice* no doubt ordered a retrial, but the question whether he could do so does not appear to have been considered.

In the result I would acquit the accused and direct that the fine, if paid, be refunded.

Phillips J.—I agree with my learned brother that for the reasons given by him the conviction should be set aside, but I do not agree that the appellant should be acquitted. If publication of the libel can be proved, and in this case there is not likely to be any difficulty in proving publication, the appellant is certainly guilty of defamation, and I do not think that in this case he should be allowed to escape the consequences of his misconduct, if he is really guilty. No doubt the prosecution could have

1. (1900) I. L. R. 28 C. 104.

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adduced additional evidence and we see that a witness had been summoned to prove that the accused published the newspaper in question, but was not examined. For what reason he was not examined there is nothing on record to show, but it does appear that the District Magistrate thought that a *prima facie* case of publication had been made out against the accused, for he framed a charge on the evidence on record. Whether the District Magistrate acted on the complaint or on Exhibit A one cannot say, but he was satisfied that a *prima facie* case of publication had been made out. We have found that in that view he was mistaken, and therefore seeing that the court itself was mistaken as to the sufficiency of the evidence on record I think that additional evidence is necessary in this case in order that the accused's guilt or innocence may be determined. Section 428 of the Criminal Procedure Code merely says that evidence may be taken when "necessary," and in each case the necessity must be determined on the particular facts of the case. The evidence is, I think, necessary in this case. I can find no case in which this court has held a view contrary to the one I now hold, and in a case very similar to the present the learned *Chief Justice* ordered a retrial (*Mohideen Abdul Kadir* v. *Emperor*[1]). I would adopt the same course unless I thought the taking of additional evidence would be a more convenient mode of disposing of the case. I would therefore ask the District Magistrate to record additional evidence on the question of publication and certify it to this court.

On reference to a third Judge on account of this difference of opinion A, Mr. Justice *Benson* before whom the case was posted made, on the 30th October 1911, the following

ORDER.—Since this case was referred to me for decision under S. 429, Criminal Procedure Code, it has been made clear by the affidavit of the complainant's counsel in the Magistrate's court and by the report of the Magistrate that the prosecution was prepared to adduce evidence of the publication of the libel, but that when counsel proceeded to adduce his evidence the Magistrate intervened and stated that it was unnecessary, the

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1. (1903) I. L. R. 27 M. 238.

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matter being already proved by the production of the newspaper and that to adduce the evidence of the clerk to prove the declaration by the accused under Act XXV of 1867 would only be wasting the time of the court.

In these circumstances I think the case is one in which retrial may properly be ordered or in which the court may properly call for evidence under S. 428, Cr. P.C., on the question in regard to which the Magistrate, in effect, improperly refused to take the evidence which the prosecution attempted to adduce. The accused's counsel deprecates a new trial owing to the delay and expense involved, and, of the two courses, prefers that additional evidence should be called for. I also think this will be the most convenient course. I will therefore direct the Magistrate to take such further evidence in regard to the alleged publication of the libel as either party may adduce and certify the same to this court as soon as conveniently may be.

After the receipt of the additional evidence, Mr. Justice *Benson* delivered the following

JUDGMENT :—The additional evidence, now recorded proves that the accused did publish the libel complained of. He is, therefore, clearly guilty of the offence charged. Looking to all the circumstances of the case as set forth in the Magistrate's judgment I do not think the sentence of fine of Rs. 300 is excessive. I dismiss the appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice and Mr. Justice Phillips.

Sinnachami *alias* Kumarettu Servaigar, Minor through his guardian Sivagnanam Servaigar .. Appellant* (*2nd Defendant*)

v.

N. A. R. Ramsawmy Chettiar & others.. Respondents (*Plaintiffs* 1 *to* 7 *and Defendants* 1, 3 *to* 9, 11 *and Representative of the deceased* 10*th Defendant.*)

Hindu Law—Adoption—Adopted son's right to set aside alienations by intervening male owner—Alienation for binding purposes and otherwise —Onus—Representations by borrower—Adoption if can divest estate when estate impartible and already vested in another male?

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* A. No. 170 of 1906. 13th September, 1911

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An adopted son cannot set aside an alienation made before his adoption by an intervening male owner of the estate, especially where the alienation is for discharging antecedent debts.

Obiter :—The adopted son cannot get it set aside even if the alienation be not for a purpose binding on the estate.

Per *Chief Justice* :—The rights of an adopted son do not relate back to a period earlier than the date of his adoption.

Semble :—Per *Curiam*—The adoption of a person to one who was not the last male owner of an impartible estate cannot divest the estate from the successor in whom it had vested before adoption.

Per *Chief Justice* :—There is no authority to show that the principle of the decision in *Bhoobun Moyee's case*[1] does not apply in the case of a joint family.

Per *Phillips* J. :—In the case of an impartible estate, although the successor must be sought for amongst the survivors of the undivided family, the succession is not by survivorship but by inheritance; and consequently, the rule laid down in *Bhoobun Moyee's case*[1] is applicable to the case of an adoption to one other than the last male owner in the case of an impartible estate.

Per *Phillips* J. :—Representations of the borrower are evidence of the necessity for the loan and may in certain cases be treated as *prima facie* proof as between the lender and the heir of the borrower.

Where a large portion of the loan has been proved to have been borrowed for family necessity, the onus of proving that the balance was not for a binding purpose is on the person who attacks the alienation.

Appeal from the decree of the Subordinate Judge's Court of Tuticorin in O. S. No. 32 of 1904.

K. Srinivasa Aiyangar for appellant.

The Advocate General (*P. S. Sivaswami Aiyar*), *S. Srinivasa Aiyangar* and *S. Sundararaja Aiyangar* for respondents.

K. Srinivasa Aiyangar :—A permission to adopt, given to a widow, by a *dayadi* is good if it is independent of any belief that the widow had her husband's authority. A consent given on the faith of the representation by the widow of her husband's authority is bad. Motives of the widow in making an adoption are irrelevant—MAYNE'S *Hindu Law*, para 128. Even a consent given to the widow on condition of giving to the dayadi certain advantages is good. Motive of the dayadi is immaterial—*Srinivasa Aiyangar* v. *Rangasawmi Aiyangar*.[2] Motive of widow in surrendering an estate to a reversioner is immaterial—*Chella Subbia Sastri* v. *Paluri Pattabhiramyya*.[3] The adoption is good irrespective of the invalidity of the conditions preceding the giving

1. (1865) 10 M. I. A. 279.
2. (1907) I.L.R. 30 M. 450
3. (1908) I.L.R. 31 M. 446.

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of the consent by a dyadi. A. S. 155 and 211 of 1904 show that the consent of a dyadi who is persuaded to give his consent by the advice of his friends who received a bribe for giving advice, is good. On the question of irrelevancy of the widow's motive see *Ramachandra Bhagawan* v. *Mulji Nanabhai.*[1] This case shows that her motive is relevant only in cases where she has not obtained the consent of all the dayadis but only of some and explains the previous Privy Council cases. This decision was followed by Mr. Justice *Sankaran Nair* in the above Madras case. On the motive of the person giving the consent being immaterial see also *Vitoba* v. *Bapu*[2]. The earliest case on the point is *Collector of Madura* v. *Mootoo Ramalinga Setupathy.*[3] *Vellanki Venkata* v. *Venkatarama* [4] explains that nothing was laid down in the last case as to the widow's motive. See also *Virata Pratapa Raghunada Deo* v. *Sri Brojo Kishore Patra Deo.*[5] *Vankamma* v. *Subramaniyam* [6] shows that it does not matter if the consent was independent, even though there was the consent of the husband. See also *Srinivasa* v. *Rangasami* [7]. I distinguish *Rama Reddy* v. *Rengamma* [8] and *Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar* [9] on the facts of those cases. In the case of an impartible estate, if there be two members who constitute a joint family, then the estate taken by one by survivorship on the death of the other is divested by an adoption made by the other's widow—*Virata Pratapa Raghunada Deo* v. *Sri Brojo KishorePatra Deo*[10]—and such an estate is a conditional one *i.e.*, a limited one. An alienation made by a person who owns such a conditional estate will be binding on the subsequently adopted son only if the alienation is one which will ordinarily be binding on the estate—*Maharaja of Bobbili* v. *Raja Kaminayani Bangaru.*[11] As soon as the previous holder's widow adopts, that alienation, unless it is of a character which will bind the estate, will not affect the adopted son who can get into possession ignoring the alienation. On the question of divesting, see also *Bachoo Hurkisoridas* v. *Mankorebai*[12] on appeal from *Bachoo* v. *Mankorebai*[13] where the principle why divesting takes place is given.

1. (1896) I.L.R. 22 B. 558 (F B) 561.
2. (1890) I.L.R. 15 B. 110.
3. (1868) I.L.R. 12 M. I. A. 397.
4. (1896) I. L. R. 1 M. 174 (P.C.).
5. (1876) I L. R 1 M. 69 (P.C.).
6. (1907) I. L. R. 30 M. 50 (P.C.)
7. (1899) I.L.R. 23 M. 486.
8. (1900) 11 M.L.J. 20.
9. (1880) I.L.R. 2 M 270. (P.C.)
10. (1876) I.L.R. 1 M. 69 (P.C.)
11. (1910) 21 M. L. J. 593, 599.
12. (1907) I.L.R 31 B. 373 (P.C.)
13. (1904) I.L. R. 29 B. 51, 56.

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If such person who had a limited estate dies and is succeeded by his son, that son is in no better position than his father—WEST and BUHLER, 3rd Edn., p. 982, Note (*b*). On the nature of the estate taken by an adopted son after an alienation, the latest case in this court is *Sreeramulu* v. *Kristamma* [1] which has been criticised as wrong by later cases in other High Courts—*Ramakrishna* v. *Tripusabhai* [2]; *Sahadeo Singh* v. *Ramanadhan Singh*[3]. A widow's alienee cannot be in a better position than the widow; so when the widow's estate comes to an end by adoption, the alienee's right in the property alienated also comes to an end—*vide* MAYNE'S remarks on the Madras case in MAYNE'S *Hindu Law*, Article 197. The Madras view is against a later Privy Council case in *Bonomali Roy* v. *Jagat Chandra Bhomick* [4] which says that the adopted son can sue to set aside the alienation from the date of the adoption. Similar are the observations in *Bamundoss Mookerjee* v. *Mussammat Tarinee* [5]—*vide* also *Collector of Madura* v. *Mootoo Ramalinga Setupathy*[6] ; SIRCAR'S *Hindu Law*, 3rd Edn., p. 169. SIRCAR on *Adoption*, p 242, shows the distinction between divesting in Bengal Law and that in the Mitakshara Law.

C. V. Anantakrishna Aiyar continued:—The interest charged is penal, for compound interest at a rate higher than that for the principal has been held to be penal.

The Advocate General :—Impartible property devolves only by succession, and not by survivorship, though the question as to who is the heir is determined by considering the family to be joint. The limit of right to adopt, whether in the case of self-acquired or joint property, must be the same. The nature of the property cannot alter the limit. If the right will cease in the case of separate property after it had vested in an heir, it will equally cease even if the property be joint— *Mussummat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* [7]; *Sri Virada Pratapa* v. *Sri Broja Kishore* [8]; *Ramakrishna* v. *Shamrao* [9]; *Manickyamate Bose* v. *Nanda Kumar Bose*.[10] So when there is one descent from first successor the power cannot be exercised. The sapindas would be incompetent to give power when if there had been the husband's

1. (1902) I.L.R. 26 M. 143.
2. (1908) I.L.R. 33 B 88.
3. (1907) A.W.N. 148.
4. (1905) I.L.R. 32 C. 669 (P.C.)
5. (1858) 7 M. I. A. 169, 180, 206.
6. (1868) 12 M.I.A. 397 at p. 443
7. (1865) 10 M.I.A 279.
8. (1876) I.L.R. 1 M. 69, 81,
9. (1902) I.L.R 26 B, 526, 529.
10. (1906) I.L.R. 33 C. 1306.

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authority it would be incapable of exercise, for the sapinda's authority is only a substitute for the husband's authority—vide *Thayammal* v. *Venkatarama*[1] a case of authority conferred by sapindas ; MAYNE, p. 144. If of two brothers *A* and *B*, who possess joint as well as self-acquired property, *A* dies, leaving a widow and his son *C*, and then *C* dies leaving a widow, it has been held that *A*'s widow cannot thereafter adopt so as to deprive *C*'s widow of her right in the self-acquired property; similarly *A*'s widow cannot adopt so as to deprive *B*'s right to joint property—see the conclusious of MAYNE, S. 191, page 250; *Mondakini Dasi* v. *Adinath Dey*[2]; *Surendra Nandan alias Gyanendra Nandan Das* v. *Sailatakant Das Mahapatra*[3] ; *Vasudeo* v. *Ramachandra*[4] ; *Dayapa* v. *Appanna*[5] ; *Lakshmi Bai* v. *Vishnu Vasudev*[6] ; *Jivarji Jamshedji* v. *Barajorji Nasservanji*[7] ; *Bhubaneswari Debi* v. *Nilcomar Lahiri*[8] . Impartible estate is separate property and not joint property and it always only descends and does not go by survivorship—*Raja of Kalahasti* v. *Achigadi*[9] , which as well as the later cases dissent from *Nachiappa* v. *Chinnayasami*[10] ; *vide* also *Zemindar of Karvetnagar* v. *Trustees of Tirupati, Tirumalay &c. Devastanoms*[11] and *Ramasami Naick* v. *Ramasami Chetty*[12]. Adoption must be made only to the last male holder; see all the cases cited in *Adivi Suryaprakasam* v. *Nidamurthy Gangaraju*[13].

An authority to adopt given by sapindas with a bad motive, *e.g.*, the defeating a creditor's claim, is bad ; *e.g.*, where it is given to the widow of the last male holder when loans have been advanced to the present holder in the hope of getting the same out of the estate.

The interest is not penal. The Privy Council should not be understood as laying down an inflexible rule in *Sundai Koer* v. *Rai Khan Krishnen*[14], *Abbekka* v. *Krishiannea*[15]. It only says that compound interest at a higher rate than that for the principal

1. (1887) I.L.R. 10 M. 205 (P.C.), 208, 209.
2. (1890) I.L.R. I. 18 C. 169.
3. (1891) I.L.R. 18 C. 398.
4. (1896) I.L.R. 22 B. 551 (F.B.) 556.
5. (1898) I.L.R. 23 B. 327.
6. (1905) I L.R. 29 B. 410.
7. (1909) I.L.R. 33 B. 499.
8. (1885) I.L R. 12 C. 18 (P.C.)
9. (1905) I.L.R. 30 M. 454.
10. (1905) I.L.R. 29 M. 453.
11. (1909) I.L.R. 32 M. 429.
12. (1906) I.L.R. 30 M. 255.
13. (1909) I.L.R. 33 M. 228.
14. (1906) I.L.R. 34 C. 150 (P.C.)
15. (1906) I.L.R. 29 M. 491.

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"may be penal." The rate of interest here originally is 12 and that on default is 15. Such rate in this country is not in itself high. Each case must depend upon its facts.

K. Srinivasa Aiyangar in reply:—It is true that the adopted son's right commences from the date of the adoption, but this does not mean that the intervening holder's acts are all binding upon the adopted son. He can recover possession even during the lifetime of his adoptive mother if her alienation be not for purposes binding upon the estate. Similar are the alienations made by a male who is on adoption liable to be divested and who is only a conditional holder.

The Court delivered the following

JUDGMENT.—*The Chief Justice* :—This is an appeal by the 2nd defendant against a decree on a mortgage, dated the 11th October 1892, executed by the father of defendants Nos. 1 and 2 on his own behalf and on behalf of the defendants in favour of the plaintiffs' predecessor in title. For the purposes of the appeal the material dates are these. In January 1897 Kumarettu, No. 14 in the pedigree, died. In October 1892, the mortgage in question was executed by Sivathaiya, No. 18 in the pedigree. In 1896, No. 18 died and his estate devolved upon defendants Nos. 1 and 2. In December 1904, the present suit was instituted. In January 1905 the widows of No. 14 adopted the 1st defendant. It seems clear (in fact the appellant did not seriously contend otherwise) that the exercise of the power to adopt was the counter move on the part of the widows and the 2nd defendant to the suit on the mortgage. For the purpose of the appeal, I assume that a valid power to adopt was given and that this power was duly exercised by the widows of Kumarettu (No. 14 in the pedigree).

The questions for consideration are :—

(1) In whom was the estate in the property comprised in the mortgage vested at the date of the adoption ?

(2) What was the nature of this estate ?

(3) Did the exercise of the power to adopt divest the estate?

(4) If it did, does the adopted son take the property subject to the mortgage which had been executed by the holder of the estate before the power to adopt was exercised ?

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As to (1), the appellant has contended that No. 18 took no estate at all (though he was entitled to possession during the life-time of the widows by an arrangement with them), and that at the date of the adoption a widow's estate was vested in the widows of No. 14.

Their case is that at the time of his death No. 14 held the property in question as his separate estate, and that a widow's estate therein devolved on his widows at his death.

Even in this view, the widows being still alive, on the authority of *Sreeramulu* v. *Kristamma* [1] the plaintiffs would be in the position of mortgagees of an interest which would be a subsisting interest during the life-time of the widows.

In *Sreeramulu* v. *Kristamma* [1] it was held that when a Hindu widow alienates part of the immoveable property belonging to her husband's estate and then adopts a son, the son cannot sue to recover possession of the property until the termination of her widowhood. It was urged that this decision was wrong. It is no doubt inconsistent with the view expressed by Mr. Mayne—see S. 197 of his book (Edition No. 7). It does not seem to be reconcileable with the decision of the Privy Council in *Rai Bonomali Roy Bahadur* v. *Jagat Chandra Bhowmick* [2] and it was expressly dissented from in *Ramakrishna* v. *Tripurabai*.[3] I do not propose to discuss the question whether the decision in *Sreeramulu* v. *Kristamma* [1] is good law. The Subordinate Judge finds against division between the branches represented by No. 14 and No. 18, and I am not prepared to differ from his conclusion. In the view that No. 14 did not hold the property as separate estate, the question considered in *Sreeramulu* v. *Kristamma* [1] does not arise for determination in this case.

I am of opinion that on the death of No. 14, subject to the widow's right to maintenance, the estate vested in No. 18. It is clear that this was the view taken by the widows (see Exhibit X). The case sought to be made in the court below, that this document was procured by coercion, was not pressed on appeal. On the death of No. 18, before the adoption, the estate vested in defendants Nos. 1 and 2 as sons of No. 18 and at the time of the adoption the estate was vested in them.

1. (1902) I.L.R. 26 M. 143. 2. (1905) I.L.R. 32 C. 669.
3. (1908) I.L.R. 33 B. 88.

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As regards the second question, the Subordinate Judge found that the property was impartible and that on the death of No.14 it devolved as an impartible estate on No.18—see paragraphs 56 to 91 of his judgment. I agree with this finding. In certain litigations in 1864 (see Exhibits N and N1) this court held that the property was impartible, and the view that it is impartible is strongly supported by the terms of Exhibit X. I need not refer to the other evidence on the question.

It was urged that as there was no specific allegation in the pleadings as to the impartibility of the estate, the Judge was wrong in allowing the plaintiffs to raise the question at the trial. The Judge deals with the point in paragraphs 93 to 95 of his judgment.

I am not prepared to say the Judge was wrong in allowing this question to be raised, or in declining to allow the defendant to recall two of his witnesses after his case had been closed (see the Subordinate Judge's order of October 17th, 1905) or in admitting the documents referred to in the Subordinate Judge's order of November 21st, 1905.

If the property was impartible, although the line of succession is governed by the same rules as if the property were joint famly property, No. 18 had unrestricted powers to deal with it. See *Sartaj Kuari* v. *Deoraj Kuari*,[1] *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards*,[2] *Rajah of Kalahasti* v. *Achigadu*,[3] and *Zamindar of Karvetnagar* v. *Trustees of Tirumalai, Tirupati &c. Devastanams.*[4] His sons could not question an alienation made by him and, if the estate divested, it could only divest subject to any alienations which had been made by the holder of the estate for the time being. No question as to the purpose for which the alienations had been made would arise.

If the estate is partible, the estate which devolved upon No. 18 on the death of No. 14, was the ordinary estate by survivorship in a joint Hindu family.

As to the 3rd question, the question whether the adoption of the 2nd defendant had the effect of divesting the estate which

1. (1887) I.L.R. 10 All. 272.
2. (1898) I.L.R. 22 M. 383.
3. (1905) I.L.R. 30 M. 454.
4. (1908) I.L.R. 32 M. 429.

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was vested in No. 18 when the adoption took place, was elaborately argued. Here the adoption did not take place until after the death of No. 18, *i. e.*, after the interest which No. 18 took, whether he took it by survivorship or as the successor to an impartible estate, had passed from him. It may be said to be now settled law that an adoption made to the last male holder of the interest claimed by the adopted son would divest an already vested interest whether the estate was partible (see *Sri Varada Pratapa Raghunada Deo* v. *Sri Brozo Krishoro Patta Deo* [1]) or impartible (see *Bachoo* v. *Mankuverbai* [2]). But I think I am right in saying it has never been held that an adoption, except where the property has reverted to the adoptive mother herself (see *Vellanki Venkatakrishna Rao* v. *Venkatarama Lakshmi* [3]) which was not made to the last male holder of the interest claimed by the adopted son, operates so as to divest an estate already vested when the adoption was made ; or, in other words, it has never been held that where the interest claimed by the adopted son had, at the time of the adoption, passed from the person on whom it had devolved from the original owner to some other person, that person would be ousted by the adoption. Here the adoption was made to No. 14, and at the time it was made, the last male holder of the interest claimed by the adopted son was No. 18. At the time of the adoption the interest claimed by the adopted son had passed from the person on whom it had devolved from the original owner.

It may be that the language of the judgment in *Mussummat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* [4] is not altogether appropriate to a case where the party whose estate is said to be divested has taken by survivorship as a member of an undivided family, but there is no authority to show that the principle of that decision does not apply in the case of a joint Hindu family. In fact, the authorities would seem to be all the other way—see for instance *Chandra* v. *Gojara Bai* [5].

In that case their Lordships observe that an adopted son, as such, takes by inheritance and not by devise, and they point out (page 311) that the rule of Hindu Law is that in the case of inheritance the person to succeed must be the heir of the last full

1. (1876) I.L.R. 1 M. 69.
2. (1904) I.L.R. 29 B. 51.
3. (1876) I.L.R. 1 M. 174.
4. (1865) 10 M. I. A. 279.
5. (1890) I.L.R. 14 B. 463.

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owner. In the present case, at the time of the adoption, the last full owner was No. 18, but the 2nd defendant claims to succeed as 'the heir' of No. 14.

The tendency of recent decisions would seem to be in the direction of limiting rather than extending the conditions in which an adoption can be made which has the effect of divesting estates or interests already vested when the adoption is made. In *Manikya Mala Bose* v. *Nandakumar Bose*[1] the rule that, where the widow of an adopted son is alive, the widow of the original owner cannot make an adoption which would oust the adopted son's widow, was extended to a case where the widow of the adopted son had died when the adoption was made by the widow of the original owner and the estate had become vested in her. The same view was taken by this court in *Adivi Suryaprakasa Rao* v. *Nidamurty Gangaraju*[2].

As regards this question the view which I should be disposed to take is that, in the case before us the adoption of the 2nd defendant did not operate so as to divest the estate which had vested in defendants Nos. I and 2 at the date of the adoption. It is not necessary, however, to decide this point because, assuming the estate was divested by the adoption, I think there can be no doubt that the adopted son would take the property subject to the mortgage. The rights of an adopted son do not relate back to a period earlier than the date of his adoption (*Bamundass Mookerjee* v. *Mussamat Tarinee*[3] and *Harek Chand Babu* v. *Bejoy Chand Mahatab*[4]). As Mr. Mayne points out (Section 197, *Hindu Law*, 7th Edition) "till he was adopted it might happen that he never would be adopted; and when he was adopted, his fictitious birth into his new family could not be antedated." Mr. Mayne goes on to observe that an adopted son would not necessarily have to acquiesce in all the dealings with the estate between the death of his adoptive father and his own adoption. He points out that when the estate has been held by a female the estate is limited by the usual restrictions which fetter an estate so held, and that, if she has created any incumbrances or made any alienations which go beyond her legal powers, the adopted son can set them aside.

1. (1905) I.L.R. 33 C. 1306.
2. (1908) I.L.R. 33 M. 228.
3. (1858) 7 M.I.A. 169.
4. (1905) 9 C.W.N. 795

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The question of the effect of an alienation by a man holding a full estate with reference to a subsequent divesting as the result of a subsequent adoption does not seem to have been considered in any reported case.

It is obvious that the restrictions which are incidental to the estate of a widow are not incidental to the full estate of a male. With reference to the estate of a full owner, Mr. Mayne observes (Section 198, *Hindu Law*, 7th Edition): "Until adoption has taken place he is lawfully in possession, holding an estate which gives him the ordinary powers of alienation of a Hindu proprietor. No doubt he is liable to be superseded, but on the other hand, he never may be superseded. It would be intolerable that he should be prevented from dealing with his own on account of a contingency which may never happen. When the contingency has happened, it would be most inequitable that the purchaser should be deprived of rights which he obtained from one who, at the time, was perfectly competent to grant them." The decision in the Berhampore case (*Sri VaradaPratapa Raghunada Deo* v. *Sri Brozo Kishore Patta Deo*[1]) that the brother who was ousted by the adoption to the last holder is not accountable for mesne profits between the date when he took possession and the date of the suit, supports the view that in the case of a male owner he is not, as Mr. Mayne puts it, " prevented from dealing with his own on account of a contingency which may never happen." The decision of the Full Bench of this court in *Ramachandra Pillai* v. *Kalimuthu Chetti*[2] that the *quantum* of the interest taken by the alienee of an undivided co-parcener is to be determined with reference to the number of co-parceners at the date of the alienation, may also be referred to.

If the *quantum* of the interest is not affected by the birth of a natural son, it would not be affected by a fictitious birth by adoption, and, if the interest of the alienee is not affected as regards the *quantum*, it is difficult to see on what principle it can be contended that he is liable to be deprived of the property altogether.

I am therefore of opinion that, in the present case, the adopted son takes subject to the mortgage. Assuming I am wrong in the view I have indicated, and that it is necessary for the plain-

1. (1876) I.L.R. 1 M. 69. 2. (1911) 21 M.L.J. 246.

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tiffs to show that the mortgage debt was contracted for purposes which were binding on the estate, I agree with the conclusion at which my learned brother has arrived, for the reasons stated by him in the judgment which he is about to deliver, that the evidence establishes that the debt was binding on the estate.

I am also of opinion, for the reasons stated by my learned brother, that, as between the 2nd defendant and his natural father, the 2nd defendant has failed to show that the money was borrowed for immoral or illegal purposes.

As regards the question of penalty, I agree with the court below that the provisions as to interest were not of a penal character. I think that this appeal should be dismissed with costs.

Phillips J.:—This is an appeal by the 2nd defendant against a mortgage decree passed by the Tuticorin Subordinate Judge in favour of the plaintiffs (respondents Nos. 1 to 7) on a mortgage bond, dated the 11th October 1892, executed by the father of defendants Nos. 1 and 2 in favour of the plaintiffs' predecessors in interest.

A very large number of questions, both of fact and of law, have been raised in the lower court and in appeal, and, as the law points depend very largely upon the facts, it will be as well to begin by recording findings upon the facts, as such findings may do away with the necessity for dealing with some of the points of law raised in the case.

The plaint bond (Exhibit A) was executed by the father of defendants Nos. 1 and 2, one Sivathaiya, in favour of two Chettis who traded under the designations of R. M. A. R. A. R. and U. A. R. respectively for Rs. 12,000 and the consideration is made up of 7 items, (1) Rs. 4,250 to discharge a prior bond in favour of Vakil Subbusami Aiyar, (2) Rs. 2,930-6-4 for payment of cist due to the Ettiyapuram Zemindari, (3) Rs. 1,000 due on a pro-note executed to R. M. A. R. A. R. alone, (4) Rs. 65 for stamp and registration expenses, (5) Rs. 2,000 for a hundi for household expenses, (6) Rs. 1,500 and (7) Rs. 254-9-8 paid in cash before the Sub-Registrar. The appellant contends that with the exception of item (1) the consideration was borrowed by Sivathaiya for immoral purposes and has adduced evidence in support of his contention.

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As regards item (2), there is no evidence as to its application for immoral purposes, but it is contended that the plaintiffs have not proved that the sum of Rs. 2,930-6-4 was actually paid for cist. We have, however, Exhibit J, an *irasalnama* or chellan, which shows that Rs. 2,930-6-4 was paid to one Subramania Aiyar. This chellan bears an endorsement "credited," which is signed by some illegible initials, but this endorsement has not been proved. No doubt Subramania Aiyar was an employee of the mortgagees' firm, but in Exhibit J he is described as the "Kattalaukulam Kattuguthagaidar's man," *i. e.*, the mortgagor's man, and the 1st plaintiff, as the plaintiffs' witness No. 8, proves his signature. The accounts, Exhibits E and K, also show the payment of this sum. Although there is no direct evidence that the money was actually paid into the Zemin treasury, it is proved that the money was paid to the mortgagor's man and that formal chellan for payment into the treasury was filled up. The mortgagees have therefore every right to conclude that the money was paid for the purposes for which it was borrowed.

5. Item (3) is Rs. 1,000 borrowed by Sivathaiya on a pronote executed to R. M. A. R. A. R. on the 8th October 1892 (Exhibit B).

The pro-note recites no purpose, but the defendants' witnesses Nos. 14, 15 and 16 say that the money was borrowed in Madura and that it was paid over by Sivathaiya to one Subbammal in the presence of the lender, Adappa Chetti. This Subbammal is admittedly a dancing woman who was kept by Sivathaiya. The evidence of these witnesses is not satisfactory, for they are interested in defendants Nos. 1 and 2 and the defendants' witnesses Nos. 14 and 15 cannot explain why they accompanied Sivathaiya to Madura. The plaintiffs' witnesses No. 5 and 7 say that the money was paid in the Chetti's shop whereas the defendants' witnesses say it was paid in the Saptur bungalow, where Sivathaiya and Subbammal were staying. Item (5) is a hundi for Rs. 2,000 for the expenses of a suit. The defendants' witnesses Nos. 7, 14, 15, 18 and 19 all say that this hundi was handed over to Subbammal, but there are many discrepancies in their evidence. Exhibit A shows that the hundi

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was drawn upon one Vairavan Chetti of the firm of R. M. M. of Tinnevelly, and that he was to pay the expenses of the contemplated suit. His accounts, Exhibits E and E1, show clearly that payments were made by him to Vakils and for the expenses of O. S. No. 50 of 1894 on behalf of the Kattalangulam Kattuguthagaidar, *i.e.*, the mortgagor. These payments together with an excess payment of Rs. 382 due to Vakil Subbusami Aiyar make up the Rs. 2,000 due on the hundi. These accounts, together with the oral evidence of the plaintiffs' witnesses Nos. 3, 4 and 6, completely falsify the evidence of the defendants' witnesses as to the payment to Subbammal, for they are unable to show that Vairavan Chetti had any other funds belonging to Sivathaiya from which the payments in the accounts could have been made. Sivathaiya's accounts have not been produced by the defendants, although it might be expected that they would give useful information. As regards item (6), we also have oral evidence that the money was paid to Subbammal. These same witnesses have given false evidence about item (5), and there is no reason why they should be believed as regards items (3) and (6). No doubt the money was borrowed in October, 1892, and O. S. No. 50 of 1894 was not filed until July 1894, but the delay has been satisfactorily explained. The Subordinate Judge has given additional reasons for disbelieving the defence evidence in regard to these items, and there is no reason to differ from his opinion. The letters, Exhibits XVI and XVII series, which tend to show that Sivathaiya wanted to give Rs. 4,500 to Subbammal, cannot have much weight in this case, for they were produced in a former suit, O. S. No. 68 of 1897, to show that the money lent by another Chetti in March 1893 was borrowed by Sivathaiya to give to Subbammal, and in that suit the plea was upheld (Exhibits XLI and XLI*a*). If, therefore, the Rs. 4,500 referred to in Exhibit XVII (*j*) was obtained from the lender in the former suit, it cannot have been borrowed under Exhibit A. Further, Exhibit XVII (*j*) is undated, and the recital in it is inconsistent with the circumstances attending the execution of Exhibit A. Exhibits XXVI and XXVII are not shown to be in any way connected with the plaint transaction. As regards the last item (7), there is no evidence except that of the defendants' witnesses that it was paid into Subbammal's hands. The Subordinate Judge's

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finding that the defendants have failed to prove that the money borrowed under Exhibit A was for immoral purposes, must be upheld.

6. Under Exhibit A seven villages are mortgaged and these are "Kattuguthagai" villages held in perpetuity at a low rent, and it will now be necessary to determine (1) the nature of Sivathaiya's estate in these villages, and (2) whether they are partible or impartible property. Up to 1878, the villages were held by one Kumarettu, and he died leaving two widows (defendants Nos. 6 and 7) and no sons. He is No. 14 in the pedigree (Exhibit XXXI). He was succeeded by the mortgagor Sivathaiya No. 18 who was his paternal uncle's son, their respective fathers being Nos. 7 and 8 in the pedigree. The appellant sets up a division between the ancestor of Nos. 7 and 8, *i. e.*, No. 2, and his brother No. 3, and a subsequent division between Nos. 7 and 8. No document is available to prove either partition, and the appellant relies on documents (Exhibits II, V, XII, XIII, XIV and XLII) which show that the junior members of the family dealt with certain lands as their ancestral property and an attempt has been made to show by oral evidence that the lands dealt with by the respective branches are equal in value. It is suggested that in the division between Nos. 7 and 8, the former took the Kattuguthagai villages, and the latter an equivalent extent of other ancestral property. The finding of the Subordinate Judge, that the Kattuguthagai villages are impartible, is not seriously controverted in appeal, and it is supported by ample documentary evidence dating back to 1857 (*vide* paragraphs 58 to 66). It is, however, urged that the defendants were not allowed an opportunity of meeting the plaintiffs' evidence as to the impartible nature of the estate. The B diary and C. M. P. No. 399 show that the question was raised before the defence closed, and although no specific issue was framed on the point it is clear that the question was present to the minds of the parties. As the Kattuguthagai villages are impartible and held by only one member of the family at a time (this latter fact is not disputed), it is most improbable that one branch would take only the impartible property and leave all the partible property to the other branch. The oral evidence by which it is sought to prove that property in possession of the members of No. 8's branch is equal in value to the impartible property belonging to No. 7's

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branch must be rejected, for, the valuation given by the witnesses is very materially opposed to the valuation given in several documents (Exhibits II, XII*a* and XLII). The separate possession of the junior members is easily explained when we consider that the family held a valuable impartible estate, the holder of which would have to make allotments for maintenance. The non-execution of a partition-deed in the case of a family holding such large properties, partible and impartible, is so improbable that very good extraneous evidence would be required to prove partition, and such evidence is not available. The presumption, therefore, that Nos. 14 and 18 were undivided must prevail, and this is also supported by the admission of No. 14's widows (defendants Nos. 6 and 7) in Exhibit X that No. 18 was the rightful heir of No. 14. The lower court's findings that the estate was impartible and that Nos. 14 and 28 were undivided must, therefore, be upheld.

After this suit was filed, and after issue but not service of notice on the defendants, the 2nd defendant was adopted by the 6th defendant with the consent of the sapindas as expressed in Exhibit I, and it is in virtue of this adoption that the 2nd defendant, the appellant, seeks to evade the plaintiff's claim. The adoption is said to have been made not only with the consent of the sapindas, but also with the authority of the deceased Kumarettu (No. 14) to whom the adoption was made. The point is not of great importance in this case, but the authority of Kumarettu is not proved. There is only oral evidence to prove the authority, which must have been given 25 years before the trial of this suit. No such authority was set up before the date of this suit, and the recital in Exhibit I goes to show that the sapindas who authorised the adoption did not believe that any authority had been given by the husband. It must, therefore, be held that the adoption was made with the consent of the sapindas. The question of whether this adoption is or is not valid has been the one most hotly contested in appeal, but before proceeding to decide that question it will be advisable to see whether the appellant can succeed, if the validity of his adoption be accepted. If his adoption be valid and effective, he would be entitled to succeed to his father's estate, but inasmuch as his adoption only took place in January 1905, the estate of his father did not vest in him until that date, and he would be bound by

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any legitimate alienations made by the intermediate holders of the estate, and he would be bound by the plaint alienation, if Sivathaiya had authority to make it. Taking the lowest view of the case, Sivathaiya would be entitled to make the plaint alienation in order to satisfy valid antecedent debts "for family necessity." Items 1 and 3 are antecedent debts; although the latter was only incurred 3 days before the execution of Exhibit A, it cannot be considered part of one and the same transaction, for, in the prior loan, the lender was only one of the lenders concerned in the plaint transaction. Item 2 was applied to the payment of cist due to Ettiyapuram. No doubt a careful man ought to have been able to pay the cist out of his current revenue, but Sivathaiya was not a careful man and incurred many debts, and a lender need be guided not by what ought to be the necessity of a borrower if he were a prudent manager, but what were his necessities at the time of the loan. The recital in Exhibit A and the appropriation of the money towards the cist are therefore sufficient to discharge the burden on the lender of proving the necessity. The Rs. 65 for stamp and registration, item (4), were also for the family necessity as well as item (5), the hundi for Rs. 2,000. The fact that the suit for which the Rs. 2,000 was required was dismissed, cannot affect the case. Even if the suit was based on a false claim, the creditors were not in a position to know the fact. That the claim was not patently false is shown by the fact that defendants Nos. 1 and 2 continued the litigation after their father's death. The only other items are Nos. (6) and (7), and of the application of these there is no evidence adduced by the plaintiffs. As regards the item of Rs. 1,500 (6), the bond Exhibit A recites that it was borrowed for "household expenses;" but as to item (7), Rs. 254-9-8 paid in cash, there is no recital at all. When a lender is dealing with a borrower who is not absolute owner of the estate mortgaged as security for the loan, it is, no doubt, incumbent on the lender to satisfy himself by reasonable enquiry that the loan is for the benefit or the necessity of the estate, for, otherwise, his charge on the estate in the hands of the next holder is liable to be defeated. but it has been remarked by their Lordships of the Privy Council in *Hunooman Persaud Panday* v. *Mussummat Babooee Munraj Koonwaree*[1]: "Their

1. (1856) 6 M.I.A. 393.

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Lordships think that the question, on whom does the onus of proof lie in such suits as the present, is one not capable of a general and inflexible answer," and later on, "the representations by the manager accompanying a loan as part of the *res gestæ* and as the contemporaneous declarations of an agent have been held to be evidence against the heir and as their Lordships are informed that such *prima facie* proof, has been generally required * * * * * they think it reasonable and right that it should be required * * * It is obvious, however, that it might be unreasonable to require such proof from one not an original party after a lapse of time and enjoyment and apparent acquiescence." Later on in the same judgment, their Lordships lay down the principles which should govern the case, and remark : "The lender is bound to enquire into the necessities for the loan * * * but they [*i. e.*, their Lordships] think that, if he does so enquire and acts honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of his charge * * * and he is not bound to see to the application of his money." The case under consideration by their Lordships was one of a charge created by a mere manager or *de facto* owner of an estate, and their remarks would apply, with even greater force, to the present case where the borrower was full owner of the estate charged and only liable to be divested of his estate by an adoption. It is clear that the representations of the borrower are evidence of the necessity for the loan and may in certain cases be treated as *prima facie* proof as between the lender and the heir. The question was recently considered by *Abdur Rahim* and *Krishnasawmi Aiyar* JJ. in *Maharaja of Bobbili* v. *Raja Kaminayini Bangaru*[1], and they remarked that the representations of the borrower "may in particular circumstances be sufficient to shift the onus from the lender to the person impeaching the alienation." This view certainly appears to be warranted by the dictum of the Privy Council in *Hanuman Persaud's case.*[2] In the present case, the plaintiffs are not the actual lenders but merely their heirs, and some 12 years have elapsed between the execution of the bond and this suit. The recitals in the bond are, in themselves, evidence as

1. (1910) 21 M.L.J. 593. 2. (1856) 6 M.I.A. 393.

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to the necessity for the loan, and the plaintiffs have been able to show that a large portion of the loan was borrowed for the family necessity and therefore, so far as the remainder is concerned, I think it may fairly be held in this case that the proved or admitted facts throw the onus of proof on the defendants. A large proportion of the loan was borrowed for purposes binding on the family, and it would therefore be only reasoneable to presume that the balance was also borrowed for the same purpose on the strength of the recitals in the mortgage-deed and the absence of satisfactory evidence to the contrary. Even if I am wrong in this view, I agree with the conclusion of the learned *Chief Justice* that an adopted son cannot defeat an alienation made before his adoption by a full male owner of the estate. The further plea taken for the plaintiffs that, as Sivathaiya was the holder of an impartible estate, his alienations cannot be questioned by the 2nd defendant, must also be upheld in view of the decision of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari*[1] which was affirmed in the *Pittapur case*[2], in both of which cases it was held that inalienability of an impartible estate must be proved by custom. No such custom has been proved in the present case and not much weight can be attached to the appellant's vakil's objection that this point was not taken in the lower court. The question of impartibility was raised in the lower court and consequently all legal incidents attaching to the tenure set up must be held to bave been in issue. The appellant must be presumed to have been aware of the law laid down in regard to impartible estates, and cannot now plead his ignorance on the point.

The validity of the 2nd defendant's adoption is impeached (*a*) because the consent of the sapindas as given in Exhibit I was not a valid consent as the motive for the adoption was corrupt, and (*b*) because the adoption was not to the last male holder.

The first objection cannot be supported as it has repeatedly been laid down that so long as the assent of the kinsmen is valid, the adoption is valid—*The Collector of Madura* v. *Mootoo Ramalinga Sethupathy*, [3] *Sri Varada Pratappa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*[4] and *Vellanki Venkata Krishna Rao*

1. (1882) I.L.R. 10 A. 272.
2. (1899) I.L.R. 22 M. 383.
3. (186.) 12 M.I.A. 397.
4. (1876) I.L.R. 1 M. 69.

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v. *Venkata Rama Lakshmi*[1], respectively. In this case it is not contended that the assent was given from corrupt motives.

The second objection is the more important one. It was held by the Privy Council in *Bhoobun Moyee's case*[2] that the adoption by a widow after her husband's estate had vested successively in his son and his son's widow, was invalid.

As explained in the subsequent cases, *Thayammal* v. *Venkatarama*[3] and *Padmakumari Debi Chowdhrani* v. *Court of Wards*,[4] not only is such an adoption invalid but the widow's power to adopt is determined on the happening of certain events. The rule to be deduced from these cases appears to be, that, when an estate is divested by an adoption not made to the last male holder but to a prior male holder of the estate, the adoption is not valid and does not divest the existing holder of the estate. This rule has been applied by the Privy Council in cases where the parties were governed by Dayabhaga Law and in cases under the Mitakshara Law where the property was separate property and not joint undivided property, but it has not been laid down that it is inapplicable to joint family property under Mitakshara Law and the Advocate General contends that it should also be applied in such a case. It was so applied by this court in *Rathna Mudaliar* v. *Raghunadha Battar*[5] and in *Adivi Suryaprakasa Rao* v. *Nidamurty Gangaraju*,[6] but in the latter case the property had vested at the date of the adoption in the widow of the last male member of the family and was no longer joint family property. In this case, however, the finding that the estate was impartible somewhat alters the case. The succession to an impartible estate is not by survivorship; for it has been held that a co-parcener in an undivided family has no interest in an impartible estate until the holder's death. Although the successor must be sought amongst the survivors of the undivided family, the succession is not by survivorship but by inheritance. I think, therefore, that the rule in *Bhoobun Moyee's case*[2] would clearly be applicable here, for the effect of the adoption to No. 14, if it were effective, would be to divest

1. (1876) I.L.R. 1 M. 174.
2. (1865) 10 M.I.A. 279.
3. (1887) I.L.R. 10 M. 205.
4. (1881) I.L.R. 8 C. 302.
5. (1898) 8 M.L.J. 173.
6. (1909) I.L.R. 33 M. 228.

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the present holder (1st defendant) who has succeeded by inheritance to No. 18, Sivathaiya, who himself succeeded No. 14. In this view I am inclined to hold that the adoption would be invalid, but I agree with the learned *Chief Justice* that the question need not be decided in this case.

In view of my finding that the family of Nos. 14 and 18 was undivided, it is unnecessary to consider what would result if the estate had vested in defendants Nos. 6 and 7 on No. 14's death and had been transferred by them to No. 18.

The only remaining point for consideration is the question of interest. The plaint bond stipulates for an enhancement of the rate of interest from 12 to 15 per cent. from date of default and also for compound interest with yearly rests. In *Abbakke Heggadthi* v. *Kinhiamma Setty* [1] a very similar stipulation was held not to be by way of penalty and the Privy Council ruling in *Sundar Koer* v. *Rai Shom Krishen* [2] lays down no rule to the contrary. The Subordinate Judge has found as a fact that the stipulation here was not by way of penalty, and I see no reason to differ from his finding. I therefore agree that the appeal should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:— Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Nataraja Iyer	..	Appellant * (*Defendant*)
v.		
The South India Bank, Tinnevelly, thro' their agent Subbiah Iyer & another	..	Respondent (*Plaintiff*)

Nataraja Iyer v. Subbiah Iyer.

C P.C.; O. XXI, rr. 46, 54—Immoveable property—Mortgage-debt.

A mortgage debt is not immoveable property within the meaning of r. 54, O. XXI, C. P. C., but falls under Cl. (*a*) of r. 46, O. XXI.

Appeal from the order of the Court of the Subordinate Judge of Negapatam dated the 6th July 1910 in E. A. 271 of 1910 in O. S. No. 30 of 1908 on the file of the Court of the Subordinate Judge of Tinnevelly.

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* A. A. O. No. 154 of 1910. 16th November 1911.

1. (1906) I.L.R. 29 M. 491. 2. (1906) I.L.R. 34 C. 150 (P.C)

Nataraja Iyer v. Subbiah Iyer.

T. R. Ramachandra Aiyar and *M. Subrahmanya Aiyar* for appellant.

T. Rangachariar and *V. Narasimha Aiyangar* for respondent.

The Court delivered the following

JUDGMENT:—The question in this appeal is whether the sale, in execution of a decree, of a debt due to the judgment-debtor under a hypothecation bond is liable to be set aside on the ground of irregularity. It cannot be so set aside, if it is to be regarded, as held by the lower court, as moveable property within the meaning of Order XXI, rule 46, corresponding to S. 268 of the old Code. The language of Rule 46, which treats as moveable property a 'debt not secured by a negotiable instrument,' is undoubtedly wide enough to cover a debt secured by a hypothecation bond or a simple mortgage.

But it is contended that such a debt is immoveable property within the definition of such property as given in the General Clauses Act as including a benefit arising out of land. It may be that a security of this character is a benefit arising out of land but supposing that this definition would show that a simple mortgage debt would generally speaking be regarded as immovable property, still we have got to see whether the meaning is really what is contemplated by the provisions of the Civil Procedure Code relating to the execution of decrees.

It seems to us that the provisions of Rule 54, Order XXI, corresponding to S. 274 of the Code of 1882 are not meant to apply to property of the nature of a debt secured by a hypothecation bond. For instance, as pointed out in *Karim-un-nissa* v. *Phul Chund*, [1] if the property to be attached is a mortgage debt where the mortgagee is not in possession nor is entitled to possession of the mortgaged property, the requirement as to the proclamation of the order at some place in or adjacent to the property and the affixing at a conspicuous part of the property could not be applied. These provisions seem to contemplate that the immoveable property should be in the nature of tangible property. Further the mortgagee not being entitled to possession, his decree-holder would not be entitled to go upon the land for the purpose of proclaiming or affixing the order.

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1. (1893) I.L.R. 15 A. 134

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Then there is another difficulty in the way of holding that mortgaged debt is to be treated as immoveable property for the purposes of attachment. Rule 54 does not provide for any order prohibiting the mortgagor, that is, the person owing the debt, from paying the debt to the mortgagee whose right is sought to be attached and without such an order the object of attachment might be frustrated. Rule 46, on the other hand provides for such prohibiting order being passed. The fact is, as pointed out in *Tarvadi Bolanath* v. *Bai Kashi*[1] and other cases, the security must follow the debt, and if the debt is once attached the benefit of the security would accrue to the attaching creditor if his remedy against the property still exists.

Much reliance, we may also mention, has been placed on behalf of the appellant on the definition of 'mortgage' as an interest in immoveable property as given in the Transfer of Property Act. But the real question, as we have said, is whether it is immoveable property within the meaning of Rule 54, Civil Procedure Code, and for the reasons we have stated it is difficult to regard it as such. There is some diversity of judicial opinion on the question under discussion, but we are satisfied that the weight of opinion is undoubtedly in favour of the view we have taken. See *Debendra Kumar Mandal* v. *Ruplal Das*[2]; *Kasinath Das* v. *Sadisiv Patnaick*[3]; *Taravadi Bholanath* v. *Bai Kashi*[1]; *Karim-un-nissa* v. *Phul Chand*[4]; *Baijnath Lohea* v. *Binoyendranath Palit*[5] and *Baldev Dhanrup Marvadi* v. *Ramachandra Balwant Kalkarni*[6]. As regards this court, opinion seems to have fluctuated. While *Turner* C. J. in *Appasawmi* v. *Scott*[7] was inclined to adopt the view which has the support of the majority of the High Courts, the other two learned Judges favoured a different view. In *Sawmi Iyer* v. *Krishnasawmi*[8] the inclination was to support the view taken by the majority of the Judges in *Appasawmy* v. *Scott*[7]. In *Muniappa Naik* v. *Subramania Iyer*[9] the view adopted in *Debendra Kumar Mandal* v. *Rup Lal Das*[2] and *Kasinath Das* v. *Sadasiv Patnaick*[3] is expressly approved, though the learned Judges seem to imply that a sale under S. 268 of the Code of 1882 might be irregular. *Achamma* v. *Basappa*[10] simply follows *Muniappa Naik* v. *Subramania Iyer*.[9] There is thus some uncertainty as to the exact view held by thi

1. (1901) I.L.R. 26 B 305.
2. (1886) I L.R. 12 C. 546.
3. (1893) I.L.R. 20 C. 805.
4. (1893) I.L R. 15 A. 134.
5. (1901) 6 C. W. N. 5.
6. (1893) I.L.R. 19 B. 121.
7. (1884) I.L.R. 9 M. 5.
8. (1886) I.L.R. 10 M. 169.
9. (1895) I.L.R.18 M. 487.
10. (1897) 8 M. L. J. 1.

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court on the point under discussion. But as the conclusion at which we have unhesitatingly arrived is undoubtedly supported by preponderance of authority of the other High Courts, we do not think it necessary to refer the matter to a Full Bench. The appeal will therefore be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—Mr. Justice Benson and Mr. Justice Spencer.

Cuddaparazu Anantarazu & others. .. Appellants *
(*Plaintiffs*)

v.

Cuddaparazu Narayanarazu & others .. Respondents
(*Deendants*).

Anantarazu v. Narayanarazu

Limitation Act, Art. 120—Suit to declare execution sale invalid—Attachment and sale, different causes of action.

An execution sale affects the title of the owner of the property quite in a different manner than that in which an attachment affects him; and consequently, an execution sale gives the owner a fresh cause of action to sue for declaration of the invalidity of sale apart from the attachment.

Second appeal from the decree of the District Court of Cuddapah in A. S. No. 159 of 1908 presented against the decree of the Court of the District Munsiff of Nandalur in O. S. No. 560 of 1906.

The Advocate General (P. S. Sivaswami Aiyar) for appellants.

L. A. Govindaraghava Aiyar for respondents.

The Court delivered the following

JUDGMENT:—We think that the decree of the lower appellate court cannot be sustained. The learned Advocate—General for the appellant, though admitting that the attachment of the 29th November 1898, was an invasion of the plaintiffs' right and gave a cause of action for a declaratory suit has, we think rightly, contended that the sale on the 30th June 1906 was a fresh invasion of the plaintiffs' right and gave a fresh cause of action. The District Judge has referred to a second attachment but apparently the first attachment was not discharged, and the Advocate-General does not base his argument on any allegation that the sale was not in pursuance of the original attachment of the 29th November 1898. Nor is it contended that the attachment is a

* S. A. No. 755 of 1910. 7th November 1911.

Anantarazu v. Narayanarazu.

continuing wrong; but we think that the sale ought properly to be regarded as a fresh and greater invasion of the plaintiffs' right, so as to give a fresh cause of action. The sale, though held in pursuance of the attachment, was not a necessary consequence of it. The plaintiffs, no doubt, might then have sued, but we do not think they were bound to sue—see *Robert Skinner* v. *Shankar Lal* [1]. The attachment gave the judgment-creditor certain rights in execution, but the title to the property continues in the owner, notwithstanding the attachment, and it so continues even if the owner's objection to the attachment be disallowed—*Narasimha Row* v. *Ganga Ram*[2]. But when a sale takes place and is confirmed the title passes to the purchaser from the date of the sale (S. 65, Civil Procedure Code). The owner's title is affected by a sale in an altogether different and greater degree than it is by an attachment. We think this gives the owner of the property a fresh cause of action. In the present case the suit was brought within six years from the date of sale, and was, therefore, not barred by Article 120, Schedule II, of the Limitation Act of 1877.

We must, therefore, set aside the decree of the District Judge and direct him to restore the appeal to his file and dispose of it according to law.

The costs in this appeal will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Sahib Thambi Marakayar	..	Appellant * (*Plaintiff*)
v.		
Hamed Marakayar and others	..	Respondents (*Defendants*).

Thambi Marakayar v Hamed Marakayar.

Partnership—Suit against one partner in representative capacity—Decree—No personal liability of others—Injunction decree, &c.

In suits where one partner is allowed to represent others as defendant in a representative capacity, any decree passed can bind those others only with respect to the property of those others which he can in law represent; and no personal decree can be passed against them, although the parties on record *eo nomine* may be made personally liable; and the same holds good even though the others were cognizant of the suit and were helping the party on record in the conduct of the case.

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* S. A. No. 475 of 1910. 10th November 1911.

1. (1908) I.L.R. 31 A. 10 (Note). 2. (1908) 18 M.L.J. 590.

Thambi Marakayar v. Hamed Marakayar.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 89 of 1909 presented against the decree of the Subordinate Judge's Court of Negapatam in O. S. No. 29 of 1907.

C. V. Anantakrishna Aiyar for appellant.

S. Srinivasa Aiyangar and *T. V. Gopalaswami Mudaliar* for 1st, 2nd and 4th respondents.

The Court delivered the following

JUDGMENT :—The plaintiff obtained a decree in Suit No. 107 of 1904 on the file of the Supreme Court of Singapore against M. L. V. Sahib Malim and Co. for money due to him from the defendants in that suit. The plaintiff alleges that one L. V. Markayar (the father of the first defendant and the husband of the second defendant in the present suit) the third defendant, and the fourth defendant in the present suit were the persons constituting the partnership of M. L. V. Sahib Malim and Co.; that the third defendant defended the suit on behalf of the firm and that a decree was passed by the Supreme Court of Singapore against the firm. The present suit is based on the judgment of the Singapore Court and is for the recovery of the amount due under that judgment The plaint alleges that L. V. Marakayar and the fourth defendant were aware of the proceedings in the Singapore Court and that the suit was defended by the third defendant with their consent. The plaintiff's case is that the judgment of the Singapore Court is binding on the first and second defendants as representatives of L. V. Marakayar and on the fourth defendant though it is admitted that notice of the suit was not served on L. V. Marakayar or the fourth defendant. The relief asked for is against the first and second defendants as representatives of L. V. Marakayar and against the third and fourth defendants personally and not against any property in their hands belonging to the partnership firm of M. L. V. Sahib Malim and Co. In fact it is not alleged that there are any partnership assets in their possession. Defendants Nos. 1, 2 and 4 denied that they were partners of the third defendant but the lower courts have found that they were, and that finding has not been attacked before us. The lower courts have dismissed the suit, upholding the defendant's contention that the

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Supreme Court of Singapore had no jurisdiction to pass a decree against L. V. Marakayar and the fourth defendant as they were not residing there either permanently or at the time of the suit and owed no allegiance to the Government of the Straits Settlements. The plaintiff's contention that the fourth defendant was at Singapore at the time of the institution of the suit has been negatived by the lower courts and we accept that finding. The plaintiff, who has appealed against the dismissal of the suit, contends that as L. V. Marakayar and the fourth defendant have been partners of the third defendant at the time of the suit at Singapore and as the suit related to money due on partnership dealings the judgment of the Supreme Court is binding on all the defendants. We consider it unnecessary to decide the question whether the judgment could be held to bind the first, second and fourth defendants to any extent, for we are clearly of opinion that we must uphold the contention of Mr. S. Srinivasa Iyengar, the learned Vakil for the respondents, that the judgment could only bind them in any event with respect to partnership property in their hands, and it is not alleged, as already observed, that they are in possession of any such property. The general rule of law undoubtedly is that in suits where one person is allowed to represent others as defendant in a representative capacity any decree passed can bind those others only with respect to the property of those others which he can in law represent, and no personal decree can be passed against them, although the parties on record *eo nomine* may be made personally liable. This is the principle applied in suits against a Hindu family as represented by its managing member and in suits to which Order I, Rule 8, of the Civil Procedure Code is applicable. It has consequently been held that an injunction in a decree in the latter class of cases is not binding on those who are not actually parties to the record. See *Sadagopachari* v. *Krishnamachari* [1]; *Srinivasa Iyengar* v. *Arayar Srinivasa Iyengar* [2].

The principle is recognised in England in partnership suits in Order 48 A, Rule 8, Judicature Act, which lays down that, where judgment or order is against a firm, execution may issue only against any property of the partnership so far as partners

1. (1889) I.L.R. 12 M. 356. 2. (1910) I.L.R. 33 M. 483.

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who are not individually served and those who have not appeared are concerned. In the Civil Procedure Code of 1908 provision has been made in this country for suing a partnership by its firm name in Order 30. Order 21, Rule 50, corresponds to Rule 8 of Order 48 A in the English Judicature Act. The judgment of the Supreme Court was against the firm and no decree was passed against L. V. Marakayar or the fourth defendant individually. There is no reason for construing it as creating a larger liability against them than to make the partnership property in their hands liable. It is unnecessary to consider whether if it purported to do so, effect would be given to such a decree in British India according to the principles of Private International law.

The Subordinate Judge apparently finds that L. V. Markayar and the fourth defendant assisted the third defendant in defending the Singapore suit and the District Judge seems to adopt that finding. Mr. Srinivasa Iyengar impugns that finding, but it is unnecessary to examine its correctness as it cannot carry the appellant's case further, for the conduct of L. V. Marakayar and the fourth defendant would not amount to more than an attempt to escape the liablity that a decree against the third defendant as representing the firm would cast on them. Mr. Anantakrishna Aiyar, for the appellant, relies also on the fact that the third defendant made a counter-claim in the suit, but this again can be referred only to his representative capacity. We must hold that the plaintiff is not entitled to the decree he asks for against the first, second and fourth defendants. We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Iyer.

In re Theophilus Ramappa .. Accused *.
(*Petitioner*).

In re Ramappa.

Cr.P.C, S. 234.—*Penal Code—Criminal breach of trust of an aggregate sum—Single charge—Legality of conviction.*

Where a person receives money for the express purpose of using it for his master's benefit in a particular way, he is entrusted with money, and his appropriation of it to himself amounts to criminal breach of trust; and consequently, a conviction for criminal breach of trust committed by misappropriation of a large sum of money made up of various items (more than three in number) on false pretences is not illegal.

* Cr. Rev. C. No. 185 of 1911. 7th November, 1911.

In re Ramappa.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revise the judgment of the Sessions Judge of South Canara in C. A. No. 62 of 1910 confirming the conviction but reducing the sentence passed on the petitioner by the Treasury First Class Magistrate of South Canara in C. C. No. 3 of 1910.

Dr. S. Swaminadhan and *B. Sitarama Rao* for petitioner.

The Public Prosecutor (*C. F. Napier*) for the Crown.

The Court made the following

ORDER:—The accused who was the Superintendent of Messrs. Killick Nixon's Coffee Curing Works has been convicted of criminal breach of trust by misappropriating a large sum of money made up of amounts which he received from the manager as various items on the false pretence that they were required for paying coolies who garbled coffee. The point argued in revision is that the receipt of each sum of money making up the aggregate amount by false representation amounted to the offence of cheating; that the charge against the accused really was that he committed various offences of cheating more than three in number; and that a single charge for all these acts of cheating was illegal. It is urged that the subsequent appropriation of the amounts by the accused to his own use would not amount to criminal breach of trust as the criminal intent was present at the time of the receipt of the moneys from the manager. This argument is not sound. When the accused received the money he did so as a servant of the company for the express purpose of using it for his master's benefit in a particular way. He was therefore entrusted with the money, and his appropriating it to himself clearly amounts to criminal breach of trust.

Dr. Swaminadhan relied on the case of *Queen* v. *Hamilton Thompson* [1] where, in similar circumstances, it was held that the offence committed was not larceny; but that case was disapproved of in the later case of *Queen* v. *Cooke* [2] where it was pointed out that the earlier case merely held that the accused received money by false pretences, but the question whether his

Cr. Rev. P. No. 142 of 1911.

1. (1862) 32 L. J. Mc. 57.

2. (1871) 40 L. J. Mc. 68.

In re Ramappa.

subsequent retention of it would amount to larceny was not considered. We are of opinion, therefore, that the conviction is right. We ought to observe that, in our opinion, counsel ought to have brought to our notice the later decision which weakened the cases relied on by him. The petition is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling and Mr. Justice Spencer.

In re Venkateswara Sastri .. Petitioner *

(Accused in C. C. No. 11453 *of* 1911 *on the file of the Chief Presidency Magistrate, Madras.)*

In re Venkateswara Sastri.

Cr.P.C., S. 526—"Equal jurisdiction"—Transfer from the file of Chief Presidency Magistrate to that of a Presidency Magistrate—High Court's powers of tranfer.

The Court of a Presidency Magistrate in Madras is a Court of "equal jurisdiction" with that of the Chief Presidency Magistrate within the meaning of S. 526, Cr.P.C., and, consequently, the High Court has power to transfer a case from the file of the Chief Presidency Magistrate to that of any other Presidency Magistrate.

Application praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to order the transfer of C. C. No. 11453 of 1911 from the file of the Chief Presidency Magistrate's Court, Madras, to that of the Fourth Presidency Magistrate.

P. Narayanamurthi for petitioner.

The Crown Prosecutor for the Crown.

The Court made the following

ORDER :—This is a petition for the transfer of C. C. No. 11453 of 1911 (a charge under S. 293, Indian Penal Code) from the file of the Chief Presidency Magistrate to that of the Fourth Presidency Magistrate.

The learned Crown Prosecutor raises the preliminary objection that the court of the Fourth Presidency Magistrate is is not one of "equal or superior jurisdiction" to that of the Chief Presidency Magistrate as contemplated in S. 526, Criminal Procedure Code ; and hence this court has no power to order the transfer prayed for.

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* Cr. Mis. P. No. 201 of 1911.

In re Venkateswara Sastri.

It has been suggested that although this court may not possess the power in question under S. 526, Cr. P. C., it may possess it under Cl. 29 of the Letters Patent or under S. 15 of the Charter Act. But the same limitation of the power to transfer is found in each of these and, in our opinion, no matter which enactment is considered, our power of transfer depends entirely on whether, for the purpose of the sections quoted, we can regard the court of a Presidency Magistrate as of equal jurisdiction to that of a Chief Presidency Magistrate.

We have not been referred to any ruling bearing on the point. In a case reported in *In re T. Murugesa Mudaliar*,[1] *Bashyam Iyengar* J. expressed a doubt as to whether this court could transfer a case from the file of one Presidency Magistrate to that of another on the ground that they were Magistrates presiding over the same court. But the learned Judge expressed no definite opinion on the point, and the case reported in *Emperor* v. *Harischandra Talchairkar*[2] is a direct authority to the contrary. We de not feel precluded from taking action under this view.

We have therefore simply to determine the meaning of the phrase " equal jurisdiction." The word "jurisdiction" is nowhere defined in the Cr. P. C., and it is one which is used in various senses. In Webster's Dictionary it is thus defined : "The legal power and authority of hearing and determining causes; the power of executing the laws and distributing justice; the right by which judges exercise their power; judicial authority over a cause; as, certain suits or actions are within the jurisdiction of a court, that is, within the limits of its authority or commission." Applying the above definition to the use of the terms in the present connection we think we shall not be wrong in saying that two courts are of equal jurisdiction when they are empowered by law, to entertain the same class of cases and to dispose of them in the same way.

Now it is not denied that the powers of a Chief Presidency Magistrate are the same as those of an ordinary Presidency Magistrate, both as to the entertainment and disposal of cases. Both are empowered to dispose of the same class of cases and to inflict the same punishments. The procedure before both

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1. (1902) 13 M. L. J. 69.   2. (1907) 10 Bom. L. R. 201.

In re Venkateswara Sastri.

is identical and each has territorial jurisdiction over the whole Presidency town. Appeals from both lie to the same court and under similar conditions.

Applying these considerations to the definition of 'jurisdiction' above quoted, they seem to fully warrant us in holding the two courts to be of equal jurisdiction and we do not think this conclusion is in any way affected by the arguments of the learned Crown Prosecutor which were directed to show that in certain particulars not affecting their ordinary jurisdiction in the sense above indicated the Presidency Magistrates are subordinate to the Chief Presidency Magistrate. The extent of the subordination of Presidency Magistrates to the Chief Presidency Magistrate, is, under S. 21, Cl. (2), of the Cr. P. C., to be defined by the Local Government. In Bombay it has been declared to be similar to that of Subordinate Magistrates to a District Magistrate under S. 17 (1). But in this Presidency the defining order is G. O. No. 168, Judicial, dated 2nd February 1900, and it is somewhat noteworthy that although asked by the then Chief Presidency Magistrate to pass a similar order, the Government of Madras directed that the subordination should be limited to the purposes of S. 124 (1), 144 (4), 192 and 528, Cr. P. C. Not one of these can, in our opinion, be properly deemed to affect the jurisdiction of the Presidency Magistrate, in the sense in which we understand the term. S. 528 alone might at first sight seem to do so; but the fact that the Chief Presidency Magistrate has the power to transfer a particular case of which a Presidency Magistrate has taken cognisance does not affect the primary jurisdiction of the latter, which is what should be looked to.

We may add that on general principles it is most natural and desirable that the High Court should possess the power of transferring a case from the file of the Chief Presidency Magistrate to that of a Presidency Magistrate. It is easy to conceive of circumstances under which it might be very undesirable for a Chief Presidency Magistrate to dispose of a case of which he had taken cognisance, and if the power now in question does not exist, the only course open to the High Court would be to try the case itself or direct committal before itself—both cumbersome remedies quite unsuitable for certain classes of cases,

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Again, the object of limiting the power of transfer is simply to prevent even the High Court from nullifying the provisions of law which secure that particular classes of cases shall be tried before different grades of courts corresponding to the gravity of the offence involved. That is to say, it was not contemplated that even this court should be authorised to empower a third class Magistrate to try an offence which, as the law enacts, should be tried only by a Magistrate of the first or second class. A case like the present stands on an entirely different footing.

For the above reasons we hold that this court is authorised to transfer a case from the file of a Chief Presidency Magistrate to that of a Presidency Magistrate. We have dealt with the question at some length as it has been fully argued and the learned Crown Prosecutor has pressed for a ruling on the point.

On the merits of the case we do not feel called upon to interfere. It is not alleged that the Chief Presidency Magistrate on whose file the case now stands is prejudiced or unfitted to try it. All that is said is that he does not possess the amount of scholarship in Telugu and Sanskrit which is necessary to understand and interpret correctly, without the aid of translation, the book in respect of which the charge is lodged, and others to which it may be necessary to refer for comparison. The difficulty, such as it is, is one nec sarily of common occurrence in a country like this with so ma vernaculars, and has to be overcome by the help of translations for the preparation of which in the present case there exists the best facilities. Even assuming that the Fourth Presidency Magistrate, from his knowledge of Telugu and Sanskrit, would enjoy certain advantages in dealing with the case (which is the utmost that can be said) we do not think this circumstance warrants us in interfering with the discretion of the Chief Presidency Magistrate who has considered and refused the petitoner's request. The petition is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sundara Iyer.

Mullaseri Achutha Menon .. Appellant*
v. (*Defendant*)
V. C. Sankaran Nair & others .. Respondents
(*Defendants and legal respresentatives of fifth Defendant*).

Achutha Menon *v.* Sankaran Nair.

Malabar Law—Karamkuri tenure, incidents of—Non-transferability—Words—' Karamkuri.'

Non-transferability is one of the incidents of *Karamkuri* tenure; and the absence of an express provision for re-entry in case of alienation is immaterial for the purpose of determining the tenure on alienation.

The word "Karamkuri" itself means only permanent right of cultivation.

Second appeal from the decree of the court of the Subordinate Judge of South Malabar at Palghat in A. S. No. 380 of 1909 presented against the decree of the Court of the District Munsiff of Alatur in O. S. No. 123 of 1908.

Suit by the melcharatdar under the old stani against the assignee of the lease who took a renewal for the new stani. The document is a karamkuri lease which the deed says is to be perpetual. One of the express incidents of the tenure is that the lessee ought not to sell, but there is no clause of re-entry on breach of the conditions.

J. L. Rozario for appellant.

M. Kunjunni Nair for respondents.

J. L. Rozario.—Though there is no express covenant yet if it be an incidental term of the tenure to re-enter in case the tenant sells, my client is entitled to a decree. A finding may be necessary to ascertain the terms of the tenure. MOORE'S *Malabar Law*, p. 307, gives the Sadar Court's proceedings. They are in my favour.

M. Kunjunni Nair :—The tenure is a perpetual one and it is transferable. This is on a par with Adima and Kudima tenures of Malabar or Mulgeni in South Malabar—S. A. No. 680 of 1880 unreported; MOORE'S *Malabar Law*, p. 308. When we remember that this grant is a Brahmin's it must be only irresumable—Malabar Law Reports, p. 14; LOGAN'S *Land Tenures*

* S. A. No. 753 of 1910. 2nd November, 1911.

o Malabar, Vol. 2, p. 183. Forfeiture is imperative against the assignees—*Narayana* v. *Narayana*[1]. Assignment is good but yet the transfer or will be liable for rent on account of the personal covenant. Karamkuri is defined in Gunter's Dictionary as one not defeasible so long as rent is fair. Anyhow the other side has to make out the incidents of the tenure. The proceedings of the Sadar Court are not inconsistent with my position.

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The Court delivered the following

JUDGMENT:—The plaintiff is *Melcharth* holder from the jenmi of certain land in the possession of the fourth defendant who purchased the rights of one Krishna Sastri. The land was demised to Krishna Sastri the father of defendants Nos. 1 to 3, under Exhibit VII, in 1893, by a *Stanom* holder a predecessor in title of the fifth defendant, on "karamkuri" tenure. The document provides the land should be held by the demisee and his anandravans "so long as they exist without selling or mortgaging" duly paying the rent fixed and also paying the renewal fee at times of renewal and 'receiving that' from the Stani." Before the time of renewal arrived, however, the land was demised on melcharth to the plaintiff. The original demisee's heirs (defendants Nos. 1 to 3) in the meanwhile had alienated the holding to the fourth defendant. The principal question we have to decide is whether the right given to the demisee under Exhibit VII was terminated by the alienation. The Subordinate Judge has held' on the authority of *Parameshri* v. *Vittappa Shanbaga*[2] and *Netrapal Singh* v. *Kalyan Das*,[3] that the alienation did not put an end to the holding. Those decisions have really no bearing on the present case. They held, on the construction of the documents in question therein, that the clause forbidding alienation without a provision for re-entry in case of alienation did not give the landlord a right to eject. The question we have to decide is whether non-transferability is one of the incidents to Karamkuri tenure. If it is, the absence of an express provision for re-entry in case of alienation would be immaterial. Perpetual occupancy right without right of alienation is well known in this country. Our attention has not been drawn to any case in which the

1. (1883) I. L. R. 6 M 327 330. 2. (1902) I.L.R. 26 M. 157.
3. (1906) I.L.R. 28 A. 400.

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question of a 'karamkuri' holder's right to transfer has been decided. The learned vakil for the appellant relies on the opinion of the Sadar Court in its proceedings of the 5th August 1856. The proceedings have always been treated as authoritative and may be relied on in the absence of any precedents. The observations made regarding 'karamkuri' are as follows: "In this case the land is made over for premanent cultivation by the tenant in return for services rendered. Where the proprietary title is vested in a pagoda, the grant will be made for future services. In some cases land is mortgaged on this tenure, the kanom mortgagee paying the surplus rent produce to the landlord, after deducting the interest of the money he has advanced. The tenant has in North Malabar only a life-interest in the property which at his death reverts to the landlord. In the south, the land is enjoyed by the tenant and his descendant. until there is a failure of heirs, when it reverts to the proprietors. Except where the land is granted for special services, an annual rent is payable under this tenure. The tenant's right is confined to that of cultivating, but it is permanent and he cannot be ousted for arrears of rent, which must be recovered by action, unless there be a specific clause in the deed declaring the lease cancelled, if the rent be allowed to fall into arrears"—MOORE'S *Malabar Law and Custom*, p. 308.

It will be observed that a karamkuri holder in North Malabar has no heritable right at all, and with respect to South Malabar the right of reversion in the landlord *prima facie* supports the appellant's contention that the tenure is inalienable. Moreover the tenant's right is stated to be confined to that of cultivation though it is permanent. The word 'karamkuri' or 'karimakuri' itself means only permanent right of cultivation. The language of the instrument shows that the cultivator has no right of alienation. We must, therefore, hold that the alienation put an end to the right created by Exhibit VII. The plaintiff is therefore entitled to a decree for possession. Payment of rent by the fourth defendant to the fifth defendant is not valid as against the plaintiff. He is therefore entitled to a decree for rent also. The decree of the lower appellate court is reversed and that of the District Munsiff restored with costs payable by the fourth defendant both here and in the lower appellate court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. Gopal Row v. Veerappen.

Present:—Mr. Justice Abdur Rahim.

Gopal Row Gadey Ram Saheb .. Petitioner* (*Plaintiff*)
v.
Veerappen Servaikaran .. Respondent (*Defendant*).

Pronote, suit on—Evidence that plaintiff was the really intended promisee—Admissibility—Mistake—Negotiable Instruments Act, S. 87.

Evidence that by the promisee named in the suit pro-note, the plaintiff was intended as the real promisee and that the entry of another name was a mistake is admissible; and to entitle the really intended promisee to succeed in a suit on the note, no prior rectification of the note itself is necessary. [*Subba Narayana Vathiar* v. *Ramaswamy Iyer*[1] distingushed.]

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tanjore in S. C. S. No. 673 of 1910.

P. S. Subrahmania Aiyar for petitioner.

T. R. Venkatarama Sastri for respondent.

The Court delivered the following

JUDGMENT:—What happened in this case was this. The plaintiff was entitled to some money from the defendant on settlement of accounts, and the defendant to secure the amount due executed the promissory note sued on. By a mistake of the writer the name of the plaintiff's father was written as the person in whose favour it was executed instead of the plaintiff's name. The plaintiff's father was dead and his name was inserted by mistake, the parties intending all the time that the plaintiff was to be the promisee. The Subordinate Judge has non-suited the plaintiff on the ground that a suit for rectification of the promissory note must be first brought and the instrument rectified before he can institute the suit. A suit for rectification of documents is not cognisable by the Small Cause Court but I do not see the necessity for such a suit. The case of the plaintiff is that he is in fact the promisee and was intended to be such but only his father's name has been entered by mistake as if it was his own name. Evidence can be given to show that there was such a mistake (see HALSBURY'S *Laws of England*, Vol. II, page 473, S. 799; *Jacobs* v. *Benson*[2] and *Wills* v. *Barrett*[3]) and there is

* C. R. P. 543 of 1910. 10th November 1911.

2. (1855) 63 Am. Decs. 609. 3. (1816) 2 Starkies Rep. 29.

1. (1906) I.L.R. 30 M. 88.

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no reason why the Small Cause Court cannot receive such evidence. S. 87 of the Negotiable Instruments Act, 1881, also seems to confirm the view, because if a party to a negotiable instrument is entitled to make an alteration to carry out the common intention of the parties, it stands to reason that evidence can be adduced to show there has been a mistake. I do not think *Subba Narayana Vathiar* v. *Ramaswamy Iyer*[1] decides anything to the contrary. Here what is sought to be proved is not that the parties intended that the benefit of the promissory note should accrue to a person not named in the instrument but that by the promisee named in the promissory note, the real promisee was intended.

The judgment of the Subordinate Judge is reversed and the suit will be remanded to him for trial on the merits. Costs will follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Perracheri Karummal Packrichi .. Appellant*
(*Defendant*)

v.

Perracheri Karummal Kumbacha ... Respondent
(*Plaintiff*).

Packrichi v. Kumbacha.

Malabar Law—Moplahs—Gift to woman's husband—Death or divorce of woman—Effect of—Marumakkathayam and Mahomedan Law.

A gift to the husband of a girl by the tarwad becomes void on the death or divorce of the girl where the parties who are Moplahs are governed by the *Marumukkathayam law*; but where the parties are governed by the *Mahomedan law*, this rule does not apply, especially when no us age to that effect is alleged.

Second appeal from the decree of the District Court of North Malabar in A. S. No. 82 of 1909 presented against the decree of the Court of the District Munsiff of Badagara in O. S. No. 818 of 1908.

V. Ryru Nambiar for appellant.

Respondent *unrepresented.*

The Court delivered the following

JUDGMENT:—The plaintiff claims to recover one half of the property which was given to the defendant's husband under Exhibit I by the plaintiff's mother and the plaintiff.

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* S. A. No. 775 of 1910. 15th November 1911.

1. (1906) I. L. R. 30 M. 88.

The ground on which the plaintiff's title is based is that prior to the death of the defendant's husband he divorced her and that according to the law by which the parties are governed, the gift became void in consequence of the divorce. The contention apparently is that the property then reverted to the donors, and as they held it as the heirs of the plaintiff's father, the plaintiff and the defendant who is her sister are entitled to it in equal shares. The document says that the property is given to the donee as *stridhanam* though that word means woman's property and the gift was to a man. It would appear that amongst the Marumakathayam Moplas of Malabar gifts are often made to the husband of a girl given in marriage, apparently as a contribution towards the maintenance of the girl and her future children. It was held in Second Appeal 1746 of 1895 that such a gift became void on the death or divorce of the girl. Now according to Marumakathayam law the Tarwad is bound to maintain the women of the Tarwad even after their marriages and if property is given to a husband for the support of his wife, it stands to reason that when he divorces her he should give back the property to the donor. The parties in this case are governed by the Muhammadan law, not by the Marumakkathayam law. A girl when married passes over to her husband's family under the Muhammadan law. There is no obligation on the members of her natural family to maintain her after her marriage even if she is divorced. There is no reason therefore for presuming that a rule of construction applicable to a stridhanam gift to a husband, where the parties are governed by the Marumakkathayam law is applicable to such instrument where the parties are governed by the Muhammadan law. The plaintiff did not allege any usage amongst Moplahs governed by the Muhammadan law according to which the gift would become void on the defendant's divorce. There is nothing in Exhibit I itself restricting the interest of the donee in any manner. If the gift was really intended for the benefit of the defendant herself and not her husband, the plaintiff would still have no title.

Packrichi v. Kumbacha.

No doubt it appears that a stridhanam gift in favour of the plaintiff's husband was held to convey only a limited estate to him. But the document is not before us and we do not know what its terms were. The result is that we must hold that the plaintiff has not succeeded in proving her title. We reverse the decrees of the courts below and dismiss the suit. The parties will bear each her own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Subbiah Pillai and others .. Appellants* (*Defendants*)

v.

Vellappa Naicker and others .. Respondents (*Plff. & Defts.*).

Subbiah Pillai *v.* Vellappa Naicker.

Decree, form of—Specific performance to sell land—Subsequent purchasers impleaded.

The proper decree to be passed in a suit for specific performance of a contract to sell land, where the land has been sold to some of the defendants subsequent to the agreement to sell, is to direct the subsequent purchaser to execute the conveyance to plaintiff.

Second appeal from the decree of the District Court of Coimbatore in A. S. No. 69 of 1910 presented against the decree of the Court of the District Munsif of Udumalpet in O. S. No. 591 of 1908.

The Advocate-General (P. S. Sivasawmi Aiyar) and *T. M. Krishnaswami Aiyar* for appellants.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for 1st respondent.

M. Subramania Aiyar for 2nd respondent.

The Court delivered the following

JUDGMENT:—The suit is for specific performance of an agreement to sell certain land entered into between the plaintiff and the first defendant. The latter subsequently sold the land to the second to fourth defendants. The plaintiff asked for a declaration that the sale in favour of defendants 2 to 4 was void as against him and for a direction that the first defendant do execute a conveyance of the land in the plaintiff's favour, and this is the decree that has been passed by the District Court. We accept the finding of the Judge that the plaintiff is entitled to specific performance. The sale to defendants 2 to 4 is good in law subject to the plaintiff's right. Section 91 of the Trusts Act enacts that in such a case the subsequent purchaser is a trustee of the property in law for the person who has a prior agreement for sale. The proper course in such a case would be to direct a reconveyance to be executed by the subsequent purchaser. We believe that the practice generally in the mofussil

* S. A. No. 1782 of 1910. 16th November, 1911.

courts is to declare the subsequent sale void and to direct the vendor to execute a conveyance. We are not prepared in the face of the existing practice to accede to the appellant's contention that the suit should be dismissed on the ground that there is no prayer in the plaint for the execution of a conveyance by defendants 2 to 4. We have the power, if necessary, to direct the subsequent purchaser to execute the conveyance. See Order XLI, Rule 33, of the Code of Civil Procedure. We, however, consider it unnecessary to do so in this case, as there are difficulties arising from the particular facts of the case. Subbiah Pillai v. Vellappa Naicker.

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Phillips.

Kai Krishnamachariar .. Appellant*
v. (*Plaintiff*)
Bagiammal and another .. Respondents
(*Defts. Nos.* 11 & 12).

Mortgage decree—Execution—Sale of properties.

A mortgage-decree-holder is not bound to make attempts to sell properties belonging to persons other than the judgment-debtor before he can proceed against the properties of the judgment-debtor under O. XXXIV, r. 6, C. P. C. Krishnamachariar v. Bagiammal.

Appeal from the decree of the District Court of South Arcot in A. S. No. 349 of 1909 presented against the Order of the Court of the District Munsif of Cuddalore in E. A. No. 778 of 1909 in 1036 of 1895.

T. Rangaramanujachariar and *C. Padmanabha Aiyangar* for appellant.

T. R. Venkatrama Sastri for respondents.

The Court delivered the following

JUDGMENT :—We agree with the learned District Judge that the decree does not provide for payment of interest of costs by the 9th defendant who is now represented by the 12th defendant. The appeal is dismissed with costs. The memorandum of objections raises the question whether the plaintiff is entitled to execute his decree for costs against the 9th defendant when it appears that the third item of the mortgaged

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* A. A. A. O. No. 64 of 1910. 4th September, 1911.

Krishnamachariar *v.* Bagiammal.

properties has not yet been sold. But this item was released on the 12th defendant, the legal representative of the 9th defendant, himself laying claim to it as his own property. That being so it could not reasonably be said that the plaintiff cannot execute his decree for costs against other properties of the 9th defendant. The cases in *Shanmuga Pillai* v. *Ramanathan Chetti*[1] and *Phirbu Narain Singh* v. *Amir Singh*[2] make it clear that a mortgage-decree-holder is not bound to make attempts to sell properties which are shown to belong to persons other than the judgment-debtor before he can proceed against the properties of the judgment-debtor. The memorandum of objections is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sankaran Nair.

Karippala *alias* Veripayur Manakkal Narayanan Nambudripad & others ..	Appellants* (*Defendants*)
v.	
Muchai Manakal Sankaran Nambudripad and others ..	Respondents (*Plaintiffs*).

Malabar Law—Karnavanship and Uraimaship.

Narayanan *v.* Sankaran.

Uraimaship is, unless expressly reserved, an incident of Karnavanship; and where a Karnavan ceases to be a Karnavan he simultaneously ceases to be the Uralan of the Davaswom of which he, as Karnavan, was also trustee; and the Uraimaship goes to his successor in title.

Second appeals from the decrees of the District Court of South Malabar in A. S. Nos. 461, 462 and 465 of 1905 presented against the decrees of the Court of the District Munsif of Alatur in O. S. Nos. 62, 61 and 71 of 1904.

P. R. Sundara Aiyar and *M. Kunjunni Nair* for appellants.

J. L. Rosario and *C. V. Anantakrishna Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The father of the second plaintiff has renounced the Karnavanship of the family of which he was the head and we are of opinion that when he ceased to be the Karnavan of his family he ceased to be the Uralan of the

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* S. A. Nos. 330, 331 and 334 of 1906. 26th February, 1909.

1. (1894) I.L.R. 17 M. 309 at p. 314. 2. (1907) I.L.R. 29 A. 369 at p. 371.

Devaswom of which the Karnavan was always the trustee. The Uraimaship is incident to the Karnavanship and unless the Uraimaship is expressly reserved in such cases it passes to the next Karnavan. Narayanan v. Sankaran.

The second plaintiff as the Karnavan of the family is therefore also a trustee of the Devaswom.

The renewals of the leases are not binding on the Devaswom as they were not granted *bona fide* in the usual course of management.

These second appeals are dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Polima Achanna (died) and others .. Appellants* (*Plaintiff and his legal representatives*)

v.

Maddipati Venkataramanna .. Respondent (*Defendant*).

Madras Acts—Rent Recovery Act VIII of 1865, *Ss.* 49. 76—*Suit for damages for unlawful ejectment under S.* 10. Achanna v. Venkataramanna.

A suit for damages for illegal eviction before the expiry of 30 days in pursuance of an order under S. 10 of Act VIII of 1865 is maintainable.

The use of the word "judgment" in S. 76 of the Act with reference to "proceedings taken by a public officer or a court" shows no more than that there are "proceedings" under the Act in which a Collector may pass a "judgment" and not there are no proceedings in which he would not pass an order not amounting to a judgment.

Second appeal from the decree of the District Court of Godavari at Rajahmundry in A. S No. 116 of 1908 presented against the decree of the Court of the Head Assistant Collector of Rajahmundry dated the 1st June 1908 in S. S. No. 3 of 1906.

P. Narayanamurthi for appellants.

T. V. Seshagiri Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The suit in this case was instituted under S. 12 of Act VIII of 1865 for recovery of possession of the land from which the plaintiff, a ryot, was ejected by the landholder in pursuance of an order obtained under S. 10 of Act VIII of 1865 in consequence of the plaintiff's failure to accept a patta which he was directed to accept by the Revenue court. The plaintiff claimed also damages sustained by him in consequence of the unlawful eviction. The order of eviction was

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* S. A. No. 1087 of 1910. 16th November, 1911.

Achanna v. Venkataramanna.

passed by the court on the 20 January 1906 and was carried out on the 22nd contrary to the provisions of S. 70 of the Act which enacts that the tenant shall not be evicted before the expiration of thirty days from the date of the order. The District Court held that the suit was not maintainable under S. 12 of the Act and in so holding it was right, as that section only provides that no tenant shall be ejected without an order under S. 10 or S. 41, but the learned vakil for the appellants contends that as the eviction was unlawful, the suit is maintainable in so far as the claim for damages is concerned under S. 49 of the Act, which provides that "any person deeming himself aggrieved by any proceedings taken under colour of this Act shall be at liberty to seek redress by filing a summary suit for damages before the Collector." This contention must prevail. Mr. Seshagiri Iyer, for the respondent, contends that S. 49 is not applicable to the case as the expression "proceedings" must be understood to mean "proceedings taken by a public officer or a court" and no proceedings of a public officer are impeached by the plaintiff as improper, and he refers to S. 76 which speaks of a judgment of a Collector in proceedings under this Act. We cannot accept this argument. S. 76 shows no more than that there are "proceedings" under the Act in which a Collector may pass "a judgment." It does not show that there are no proceedings in which he would not do so. The Act authorises the landholder also to take several proceedings without resort to the Collector. He can tender pattas and distrain property for arrears of rent on his own responsibility and he may be guilty of various illegalities and irregularities in doing so. He may distrain property when there are no arrears, or without properly tendering a pattah which the tenant is bound to accept. He may distrain without making a demand of the arrears as required by law. He may act in violation of the various provisions relating to distraint. Suits have been entertained in all these cases. See *Rajah Chelikani Venkata Gopala Nayanim Garu* v. *Narayanaswami Reddi*[1]; *Velagabati Ramakrishnayya* v. *Suranini Papayya Apparow*[2]. We must hold that the claim for damages is maintainable. We reverse the decrees of the lower courts and remand the suit to the court of first instance for fresh disposal according to law, in so far as it relates to the claim for damages. Each party will bear his own costs throughout up to date.

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1. (1904) I.L.R. 27 M. 210.
2. (1904) I.L.R. 27 M. 430.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Venkatagiri v. Sadagopa Chariar.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

T. Venkatagiri Aiyar and others ... Appellants* (*Plaintiffs*)

v.

P. Sadagopachariar .. Respondent (*Defendant*).

Mortgages, prior and puisne—Decree and sale by prior mortgagee—Second suit by puisne mortgagee for sale and purchase—Suit by prior purchaser for possession—Remedies of non-impleaded second mortgagee.

Where the first of two simple mortgagees of the same property brings a suit without impleading the second mortgagee, obtains a decree and himself purchases the property, and the second mortgagee afterwards brings the same property to a court sale in execution of a decree on his mortgage, *Held*: that the purchaser in the second sale takes no interest as against the first purchaser.

The first purchaser takes the right which the prior mortgagee and the mortgagor could convey to him; and he cannot be disturbed so long as the first mortgagee's right to convey the title vested in himself and the mortgagor subsists, *i.e.*, until the first mortgage is redeemed. The proper course for the non-impleaded second mortgagee is to redeem the first, and then the purchaser in execution of the decree on the first mortgage can redeem the two mortgages vested in the second mortgagee; and if the purchaser does not redeem the puisne mortgagee who has obtained by redemption the right of the first mortgagee, the properties may be sold, the mortgagees paid, and the balance paid to the purchaser as the representative of the mortgagor.

The prior mortgagee cannot be deprived of his rights to require the puisne mortgagee to redeem him and in default to enforce his right under his instrument of mortgage by sale or foreclosure, and there is no reason why he should not be allowed to do this even as a defendant in a mortgage suit. [*Mulla Veetil Seethi* v. *Achuthan Nair* 1 commented upon and observations therein doubted. *Kutti Chettiar* v. *Subramania Chettiar* 2 followed.]

Second appeals from the decree of the District Court of Salem in A. S. Nos. 228 and 121 of 1907 and 26 of 1908, presented respectively against the decree of the Court of the Additional District Munsif of Salem in O. S. No. 114 of 1907 and decisions of the Court of the Head Quarters Deputy Collector of S. S. Nos. 6 of 1907 and 2 of 1908.

S. Srinivasa Aiyangar and *T. R. Venkatrama Sastri* for Salem in appellants.

T. Narasimha Aiyangar for respondent.

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* S. A. No. 1789 to 1791 of 1908. 16th November, 1911

1. (1911) 21 M. L. J. 213. 2. (1909) I. L. R. 32 M. 485.

Venkatagiri v. Sadagopa Chariar.

The Court delivered the following

JUDGMENT:—The lands in suit were hypothecated to Lakshmana Goundan in 1877. He brought a suit (O.S. No. 8 of 1881) to enforce that mortgage, obtained a final decree in 1890 and purchased it in 1895. The plaintiff is his assignee: he obtained possession in 1897. He now sues the defendant for confirmation of, and injunction against, any disturbance of his possession.

The defendant obtained a simple mortgage of the same lands in 1880. He sued in O. S. No. 12 of 1886 to enforce his claim, obtained a decree for the sale of the hypothecated property subject to the lien of Lakshmana Goundan, the prior mortgagee, who was the 8th defendant in the suit, and brought the equity of redemption to sale in 1905. He says he got possession in 1906.

The defendant was not a party to the prior mortgagee's O. S. No. 8 of 1881. In the District Court the question was raised whether lands in suit were included in the mortgage of 1877. It was disallowed by that court and we see no reason to allow it.

On these facts it is contended on behalf of the defendant, who is the appellant before us, that the plaintiff has no right to the possession of the property against him and he is not, therefore, entitled to the declaration and injuction sought for.

In *Venkatanarasammah* v. *Ramiah*[1] there were sales in execution of decrees obtained by two simple mortgagees; neither made the other a party to his suit. It was held by *Innes* and *Kernan* JJ. that the plaintiff, who was the prior mortgagee and first sold the property, was entitled to possession under the sale; the reason being that after the first sale to the plaintiff there was no right or interest in the mortgagors left to sell and the purchaser under the second sale, therefore, acquired no interest against the first mortgagee-purchaser. It was also held that the defendant's interest as mortgagee was not affected by the sale to the plaintiff. It will be observed that neither the plaintiff nor the defendant was usufructuary mortgagee, and that, though the plaintiff was the prior mortgagee, nothing turned on the priority

1. (1879) I.L.R. 2 M. 108.

Venkatagiri v. Sadagopa Chariar.

of the mortgage, but the priority of the sale determined the right to possession. It was accordingly held by *Benson* and *Moore* JJ., following this ruling, that a puisne simple mortgagee who first sold the property and obtained possession was entitled to retain possession against a prior mortgagee whose sale was subsequent in time, neither mortgagee being a party to the other's suit —*Akatti Moidin Kutty* v. *Chirayil Ambu.* [1] The decisions in *Nanack Chand* v. *Teluckdyr Koer*[2] and *Dirgopal Lal* v. *Bolakee Koer*[3] were also cited therein in support of this view. These decisions were followed by the *Chief Justice* and *Abdur Rahim* J. in *Kutti Chettiar* v. *Subramania Chettiar*[4]. The ground of decision is thus in our opinion correctly, stated: "Both the mortgagees have an equal right to sell the property, and once it is sold at the instance of one mortgagee, there is no further saleable interest left in the judgment debtor to be sold again." It was not argued before us that these cases were wrongly decided. It is not difficult to show that they are based on perfectly sound reasons. The first simple mortgagee has a right to sell the mortgagor's interest. The latter is entitled to carve out an interest in favour of any persons by granting him a simple mortgage which carries with it the right of redeeming the first mortgage. The mortgagor's interest which the first mortgagee is entitled to sell is thus vested by the creation of the subsequent incumbrance in such mortgagee and the mortgagor. The prior mortgagee thus becomes entitled to enforce his claim against the mortgagor and the puisne incumbrancer, and he is entitled in a suit brought for sale to compel the puisne mortgagee to exercise his right to redeem him or in default to sell the entire mortgagor's interest as it stood at the date of his mortgage. But if he does not make the second mortgagee a party to his suit for sale, he cannot thereby affect the interest vested in him as against himself, but there is nothing to prevent him from enforcing his claim against the residue of the interest that remains in the mortgagor after the creation of the second incumbrance and continues in him at the time of the sale, and such sale is valid to convey that interest. The second mortgagee has the same right to sell the mortgagor's interest. As both of them are entitled to do so the first sale puts an end to the

1. (1902) I.L.R. 26 M. 486
2. (1879) I.L.R. 5 C. 265.
3. (1879) I.L.R. C. 269.
4. (1909) I.L.R. 32 M. 485.

Venkatagiri v. Sadagopa Chariar.

mortgagor's interest and conveys it to the purchaser. If, therefore, the first mortgagee sells the property before the puisne mortgagee, then there is nothing for the latter to sell. And in the case before us the plaintiff's assignor, the first mortgagor, first sold the equity of redemption in 1895 and obtained possession in 1897. When the defendant, therefore, sold the property in 1905, there was no interest vested in the mortgagor for him to sell and the sale, therefore, conveyed no interest as against the mortgagee, Lakshmana Goundan, who first purchased and who by his purchase became entitled to the possession of the property which was vested in the mortgagor, neither of the mortgages being usufructuary.

It was contended that as Lakshmana Goundan was a party to O. S. No. 12 of 1886 it is not open to him to deny the validity of the sale in that suit, and also that he took the property as purchaser in execution of his own decree subject to the result of that suit.

The plaintiff's claim is clearly not *res judicata*. Lakshmana Goundan's right as mortgagee was preserved by the decree. He had not then purchased the property and it cannot, therefore, be successfully contended that by reason of that decree he cannot rely upon his purchase, which gives him the right to possession; nor is there anything in the judgment or decree which precluded him from enforcing his lien for which he had already brought a suit.

Lakshmana Goundan's purchase is not affected by the doctrine of *lis pendens*. On this question there was no serious attempt to distinguish this case from the decision of the *Chief Justice* and *Abdur Rahim* J. in *Kutti Chettiar* v. *Subramania Chettiar*.[1] It was then argued that according to the opinion of the Full Bench in *Mulla Veetil Seethi* v. *Achutain Nair*[2] the defendant's rights are in no way affected by the proceedings and sale in O. S. No. 8 of 1881 to which he was not a party: he had, therefore, the right to sell the equity of redemption: he had sold that right and is, therefore, the person rightfully entitled to possession. It will be observed that this contention does not turn upon the question whether the first mortgagee was a party to the suit of

1. (1909) I.L.R. 32 M. 485. 2. (1911) 21 M.L.J. 213.

the puisne mortgagee, because he is not a necessary party to the suit which the puisne mortgagee is entitled to bring to sell the equity of redemption. Venkatagiri v. Sadagopa Chariar.

This was not the question referred to the Full Bench for their opinion. The facts did not raise it. In that case the puisne mortgagee, the first defendant, was entitled to possession as a usufructuary mortgagee and the plaintiff, the purchaser of the equity of redemption in execution of the prior simple mortgagee's decree for sale, did not, therefore, obtain the right to possession. The only question which the learned Judges considered of sufficient importance to refer to the Full Bench was whether the plaintiff was entitled to a decree for possession. The learned pleader for the plaintiff, the respondent in that case, however, argued that the first defendant had lost his right to possession by the plaintiff's purchase in execution of his decree and that he was only entitled to redeem the first mortgage; and that if he failed to do he must surrender possession, and he also argued that, by reason of his purchase, he acquired the right of foreclosure. There is scarcely any Madras authority in support of the view that a puisne mortgagee in possession under his mortgage loses his right to such possession and is bound to surrender his property to a purchaser in execution of a decree enforcing a prior mortgage, in a suit to which he was not a party. But in the judgment other questions are also discussed, and it was apparently decided that a puisne mortgagee may sue the purchaser of the equity of redemption without redeeming the prior mortgage; and it is, therefore, contended that the defendant is entitled to sue the plaintiff for the sale of the equity of redemption purchased by him, and, as the plaintiff would not be entitled to retain possession after such sale his suit must be dismissed. Perhaps it is sufficient to point out in reply that, if the defendant has got the right to sue the plaintiff as a purchaser, he has not yet exercised that right, his prior suit having been instituted before the purchase. The plaintiff was a party to it only as mortgagee, and according to the decisions of this court an unnecessary party. Mr. Justice *Innes* has expressed a doubt in *Venkatanarsammah* v. *Ramiah*[1] whether the second mortgagee could bring a fresh suit. The judgment in *Muhammad Usan Rowthan* v. *Abdulla*[2] has been stated by the Full

1. (1879) I.L.R. 2 M. 108. 2. (1900) I.L.R. 24 M. 171.

Venkatagiri v. Sadagopa Chariar.

Bench to lay down the law correctly to the effect that a second suit will not lie. However that may be, till the defendant enforces his rights, and obtains the right to possession by sale of such right now vested in the plaintiff, the claim of the latter must be upheld.

This is sufficient to dispose of this contention.

But it may also be pointed out that the cases above referred to have not been dissented from : on the other hand, they have been cited with approval as laying down the law that the equity of redemption becomes vested in the purchaser in execution of the mortgage-decree, and that it could not be sold again by the puisne mortgagee as by the defendant in this case. Any general observations, therefore, that the mortgagee has the right to sell the property must be taken subject to the limitations imposed by the principles laid down in these cases. But it is true there are many observations which lead to the opposite inference, that is, that it is open to the puisne mortgagee to sue for the sale of the property or equity of redemption without redeeming the prior mortgagee. This seems opposed not only to the principles laid down in these cases, but also to almost all, if not all, the decisions of this court, and the following considerations have to be borne in mind when the question arises for final decision.

Either the prior mortgagee or the puisne mortgagee may sell the property to enforce his claim, and the purchaser under the first sale acquires a title to hold it against the purchaser in execution of a decree to enforce the other mortgage. This seems to lead to the necessary inference that after the purchase the other mortgagee is entitled to sue the mortgagor for sale, though he was not a party to the proceeding which deprived him of his right to sue. The right to sell was only against the mortgagor and not against the prior mortgagee—Order XXXIV, rule, 1. The purchaser takes the right which the prior mortgagee and the mortgagor could convey to him; he cannot, therefore, be disturbed so long as the first mortgagee's right to convey the title vested in himself and the mortgagor subsists, that is, until the first mortgage is redeemed. This right to redeem the first mortgagee is, therefore, the right vested in the puisne mortgagee. If the second mortgagee again could sell the equity of redemption subject to the claim of the prior mortgagee, the latter could

again sell it—each mortgagee might go on *ad infinitum* without making the other a party, and it was, therefore, held by our High Court in a course of decisions that in such cases the puisne mortgagee's proper course is to redeem the first mortgagee—*Krishnan* v. *Chadayam Kutti Haji* [1] and *Muhammad Usan Rowthan* v. *Abdullah* [2] followed in later decisions hereinafter referred to. Then, the purchaser in execution of the decree on the first mortgage may redeem the two mortgages vested in the same person. —see *Sivaraman Chetty* v. *Kuppumuthu Chetty*[3] (*Bhashyam Aiyangar* and *Moore* JJ.), *Govardhana Doss* v. *Veerasamy Chetty*[4] (*Chief Justice* and *Moore*, J., confirming a judgment of *Boddam*, J.), *Venkataramana Iyer* v. *Gompertz*[5] (*Chief Justice* and *Miller* J.)—and if the purchaser does not redeem the puisne mortgagee who has obtained by redemption the right of the first mortgagee, the properties may be sold, the mortgagees paid and the balance paid to the purchaser, as the representative of the mortgagor—see *Venkataramana Iyer* v. *Gompertz*[5] and *Nagammal* v. *Venkatagiri Aiyar*[6]. As pointed out by Mr. Justice *Shephard* in *Muhammad Usan Rowthan* v. *Abdulla* [2], this seems to follow from the decision in *Venkatanarasammah* v. *Ramiah*[7]. These cases have not been overruled by the Full Bench and no reasons are given why these decisions should not be accepted as good law. The puisne mortgagee got a right to sell the property even after sale by the first mortgagee as shown above, but he can exercise that right only after redeeming the prior mortgagee. It is clear that the prior mortgagee cannot be deprived of his rights to require the puisne mortgagee to redeem him and in default to enforce his right under his instrument of mortgage by sale or foreclosure, and there is no reason why he should not be allowed to do this even as a defendant in a mortgage suit.

It was argued that the decision in *Rangayya Chettiar* v. *Parthasarathi Naicker* [8] recognises the right of the puisne mortgagee to sue for a sale of the property subject to the prior mortgagee's claim even after it has been sold by the first mortgagee; and as this decision has been declared good law by the Full Bench, the decisions above referred to, as they are inconsistent with

1. (1892) I.L.R. 17 M. 17.
2. (1900) I.L.R. 24 M. 171.
3. (1902) I.L.R. 13 M. L. J 72.
4. (1902) I.L.R. 26 M. 637.
5. (1908) I.L.R. 31 M. 425.
6. (1897) 8 M.L.J. 299.
7. (1879) I.L.R. 2 M. 108.
8. (1896) I.L.R. 20 M. 120.

Venkatagiri v. Sadagopa Chariar.

Rangayya Chettiar v. *Parthasarathi Natcker*,[1] should no longer be followed. The decree in the case in *Rangayya Chettiar* v. *Parthasarathi Naickar*[1] was that the property which had been already purchased by the defendants Nos. 3 to 6, the prior mortgagees, in execution of their decree, should be put up to sale, and "if the property be not bid for more than the amount due to them" the sale should be stopped and the defendants Nos. 3 to 6 should, by virtue of their purchase, hold the property and the suit of the puisne incumbrancer be dismissed, otherwise out of the sale amount the mortgagees to be paid in their order. This decree was confirmed by the High Court. It will be observed that the first mortgagee's purchase was to stand good or the properties were to be sold only on condition of his mortgage-debt being discharged. There was no sale *subject* to his mortgage. Certain observations in this judgment are apt to mislead as pointed out by the same learned Judge who delivered that judgment in his later judgment in *Muhammad Usan Rowthan* v. *Abdulla* [2], nor is this case followed in *Venkataramana Iyer* v. *Gompertz* [3], on this point as erroneously stated in the Full Bench judgment. It was followed only with reference to the question of improvements. For these reasons, we would dismiss the second appeal with costs.

It is conceded by the pleaders that, in accordance with the judgment in S. A. 1789 of 1908, these second appeals also must be dismissed. They are accordingly dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Phillips.

Vadlamudi Venkatasubbiah and another .. Petitioners*
v. (*Plaintiff*)
Vadlamudi Seshachellum and another .. Respondents
(*Defendants*).

Venkatasubbiah v. Seshachellum.

C. P. C., S. 115, *O.* 6, *r.* 17—*Erroneous exercise of discretion.*

The mere fact that the lower court erroneously refused to allow amendment of a plaint is no ground for interference.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Nellore in C. M. P. No. 369 of 1910 in O. S. No. 14 of 1908.

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* C. R. P. No. 674 of 1910. 8th September, 1911.

1. (1896) I.L.R. 20 M. 120. 2. (1900) I.L.R. 24 M. 171

3. (1908) I.L.R. 31 M. 452.

T. V. Muthukrishna Aiyar for petitioners.

Venkata-subbiah v. Sesha-chellum.

S. Subramania Aiyar for respondents.

The Court delivered the following

JUDGMENT:—The main question here is whether this court has jurisdiction to interfere under S. 115, C. P. C., with the District Judge's order refusing amendment of the plaint on the ground that it materially altered the character of the suit. It is evident from his order and from the records that he did exercise his jurisdiction under Order O. VI, Rule 17, and on that ground no interference is possible. It is then contended that he exercised that discretion with material irregularity and I am referred to numerous rulings in which orders have been set aside on revision on that ground, the most important of which are *Pramotha Nath Mitra* v. *Rakhal Das Ally* [1], *Dwarkanath Sen* v. *Kisori Lal Gasain* [2], *Kisandas Rupchand* v. *Rachappa Vithoba* [3], *Charu Chunder Datt* v. *Sarut Chunder Singh* [4] and C. Rev. P. No. 556 of 1910. It appears to me, however, that in cases of this sort each case must be treated on its merits. No doubt in this case the amendments might not have prejudiced respondents to any material extent, but petitioner rushed into court while litigation was still pending and as the result of such litigation his suit, as framed, was not maintainable and had to be amended in such a way as to alter its nature to some extent. In fact, in this case, even if I were prepared to hold that the District Judge did exercise his discretion wrongly, I must find that he has not acted with such material irregularity as to justify interference under S. 115, C. P. C. I am strengthened in my view by the recent ruling in *Jothy Mahalinga Iyer* [5]. He exercised his jurisdiction and did so on the merits of the case. The mere fact that discretion may be erroneous is no ground for interference.

The petition is dismissed with costs.

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1. (1910) 11 C. L. J. 420.
2. (1910) 11 C. L. J. 426.
3. (1909) I.L.R. 33 Bom. 664.
4. (1910) 12 C. L. J. 537.
5. (1911) 10 M. L. T. 188.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Arulanandham Pillai, In re .. Petitioner*

(*Accused in C. C. No.* of 154 of 1911 *on the file of the 2nd Cl. Magte. of Sivaganga and Appellant in Cr. Ap.* 42 *of* 1911 *on the file of the Sub. Divl. Magte. of Devakota.*)

In re Arulanandham.

Cr. P. C., S. 250—"*Information to Police*"—*Information to Village Magistrate of theft.*

Information given to a Village Magistrate cannot be regarded as information given to the Police even though the Village Magistrate is bound to report it to the Police. Consequently a complainant who complains to the Village Magistrate of theft cannot be ordered to give compensation under S. 250, Cr. P. C. [*King-Emperor* v. *Thammana Reddi* 1 followed].

Case referred for the order of the High Court under S. 438 of the Criminal Procedure Code by the Sessions Judge of Ramnad at Madura in his letter dated 7th September 1907.

The Court made the following

ORDER:— In this case the Second Class Magistrate awarded compensation to the accused whom he acquitted on a charge of theft. The complainant gave to the Village Magistrate a report of the theft and the Village Magistrate made a report to the police. The Second Class Magistrate took no cognizance of the offence on the report of the police. The Sub-Divisional Magistrate set aside the order awarding compensation on the ground that the case was not instituted by "complaint" as defined in the Criminal Procedure Code or upon information given to a police officer or to a Magistrate, the Village Magistrate not being a Magistrate within the meaning of S. 250 of the Criminal Procedure Code (See S. 1). In this view the Sub-Divisional Magistrate was, in our opinion, right. The only person to whom the complainant gave information was the Village Magistrate. He cannot be regarded as having given information to a police officer, although the Village Magistrate was bound to report the

* C. R. C. No. 537 of 1911. 23rd November, 1911.
C. R. No. 96 of 1911.

1. (1901) I. L. R. 25 M. 667.

occurrence to the police. *King-Emperor* v. *Thammana Reddi* [1] is exactly in point. Its authority is in no way affected by the case of the *Sessions Judge of the Tinnevelly Division* v. *Sivan Chetti* [2]. That case decided only that when information is given to a Village Magistrate it might in certain cases amount to an institution of criminal proceedings or a charge of an offence. *In re* Arulanandham.

That has no bearing on the question whether information given to a Village Magistrate can be regarded as information given to the police to whom he was bound to report. We are of opinion, therefore, that there is no ground for interference.

The record will be returned to the Sessions Judge.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Spencer.

A.R.R.M.S.V. Sevugan Chetty .. Appellant (*Plaintiff*)

v.

Krishna Aiyangar and another .. Respondent (*Defendants*).

C. P. C., O. VI, r. 17—Amendment of plaint—Addition of prayer for further relief. Sevugan Chetty *v.* Krishna Aiyangar.

Where the plaintiff asks for an amendment of the plaint by the addition of a further relief without seeking to add anything to the allegations in the plaint, the court should allow the amendment; and the mere fact that the further relief asked for might have become barred does not necessarily render the amendment improper.

Second Appeal from the decree of the District Court of Madura in A. S. No. 551 of 1909 presented against the decree of the Court of the District Munsif of Sivaganga in O. S. No. 478 of 1908.

V. C. Seshachariar for appellants.

C. Madhavan Nair for respondents.

The Court delivered the following

JUDGMENT:—We think that the courts below were in error in refusing to allow the plaintiff to amend his plaint as prayed in his petition of the 8th July 1909. This petition was

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* S. A. No. 722 of 1910. 25th October 1911.

1. (1901) I.L.R. 25 M. 667.
2. (1909) I.L.R. 32 M. 258.

Sevugan Chetty v. Krishna Aiyangar.

put in before any evidence had been recorded. It did not allege any new facts, but merely prayed that an additional relief might be granted on the facts stated in the original plaint.

It may be that the further relief then asked for had become barred in the interval, but we do not think that this by itself necessarily renders the amendment improper. The rule applicable is that contained in Order VI, Rule 17, of the new Code of Civil Procedure which enacts that the court may at any stage allow a party to amend the pleadings "in such manner as may be just" and that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." There can be no doubt that both the conditions laid down in the above rule are satisfied in the present case. The reliefs claimed by the plaintiff and the facts on which he claimed them are stated in the original plaint, though he then only asked the court to recover his account books from the defendants, who were alleged to be his servants, and said he would bring a separate suit for the money due by them. He afterwards thought it was desirable to claim the recovery of the money in the same suit. There is no injustice to the defendants in allowing this amendment, for the effect of it is to enable the plaintiff to prove his right to money which, before any bar by limitation had arisen, he had in the original plaint claimed as due to him by the defendants (see the remarks of *Batchelor* J. in *Kisandas Rupchand* v. *Rachappa Vithoba* [1] and also the recent case in this court, *Mulla Veettil Seethi Kutti* v. *Korambath Painthuti Achutan Nair* [2]. The case of *Weldon* v. *Neal* [3] is very different from the present case, for in that case the proposed amendment alleged assault, malicious prosecution and other facts not stated in the original plaint, and which constituted a totally new cause of action. The courts below not only refused to allow amendment in the present case, but dismissed the plaintiff's suit as originally framed on the ground that it was unsustainable.

We do not understand why it was considered to be so. The plaintiff alleged that the defendants were his servants on a monthly pay and had charge of his shop, and claimed that the

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1. (1909) I.L.R. 33 Bom. 644 at 651.
2. (1911) 21 M.L.J. 475.
3. (1887) 19 Q.B.D. 394.

accounts kept by them in regard to the business were his property and he sued to recover these accounts. It is difficult to see why such a suit should be unsustainable. Sevugan Chetty v. Krishna Aiyangar.

We set aside the decrees of the courts below and remand the suit to the District Munsif to be restored to his file and to be disposed of according to law. He should allow the amendment desired by the plaintiff, and allow the defendants to put in a fresh written statement if they desire to do so, and if necessary, he should revise the issues.

The costs will abide the results.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

The Assistant Sessions Judge of North Arcot .. Appellant* (*Petitioner*)

v.

Ramaniammal and others .. Respondent

(*Accused in Preliminary Register Case No.* 4 *of* 1911 *on the file of the Stationary Second Class Magistrate of Tirupattur.*)

Cr.P.C., Ss. 213, 531, 195—"*The Court of Session*"—*Order of commitment—Sanction for offence under S.* 468—"*Using a document*"—*Penal Code, Ss.* 468, 471. Sessions Judge of North Arcot v. Ramaniammal.

The expression "the Court of Session" in S. 213, Cr.P.C., can only mean the Court of Session having jurisdiction to try the case under S. 177, Cr.P.C. and every commitment should only be to the court empowered to try the case under S. 177 Cr. P.C.; and if a commitment is made to a wrong court, the whole trial is illegal and a transfer to the right court of session from the court having no jurisdiction would not render the proceeding legal. [*Ledgard* v. *Bull*[1] followed.]

An offence under S. 463, I. P. C., mentioned in Cl. (*c*) of S. 195, Cr. P. C., covers an offence under S. 468, I. P. C., the object of mentioning S. 463 in S. 195 (*c*) Cr. P. C. being to include all cases of forgery whatever the nature of the fraudulent intention may be. [*Queen-Empress* v. *Tulja*[2] referred to.]

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* Cr. M. P. No. 340 of 1911 — 29th November, 1911.

1. (1886) I. L. R. 9 A. 191.
2. (1887) I.L.R. 12 Bom. 36.

Sessions Judge of North Arcot v. Ramaniammal.

Obiter:—The expression "using a document" is apparently used in the sense of its being put forward in some way for one of the purposes mentioned in S. 463, I.P.C.

An involuntary production of a document in court in obedience to a summons to produce it is no user of it within the meaning of S. 471, I. P. C.

An order of commitment is an order within the meaning of S. 531, Cr. P. C.

Application praying that in the circumstances stated in the letter of reference dated the 4th October 1911 and the order of reference made by the Assistant Sessions Judge of North Arcot dated the 3rd October 1911 in the Sessions Case No. 5 of 1911 the High Court will be pleased to quash the order of the Second Class Magistrate of Tirupattur dated the 5th September 1911 in Preliminary Register Case No. 4 of 1911 committing the accused therein to take their trial at the Sessions Court of North Arcot.

T. Narasimha Aiyangar for the accused.

The Public Prosecutor (*C. F. Napier*) for the Crown.

The Court made the following

ORDER:—This is a reference made by the Assistant Sessions Judge of North Arcot asking this court to quash the commitment of the accused in Sessions Case No. 55 of 1911 to the Court of North Arcot. The order of commitment was made by the Second Class Magistrate of Tirupattur. There are five accused in the case. The first accused Ramammah is the widow of one Rammakrishnier whose mother is the complainant. The second and third accussed are respectively the father and brother of the first accused. The fourth accused is also a relation of accused Nos. 1 to 3. The first accused executed on the 20th July 1905 a mortgage deed for Rs. 3,000 in favour of the third and fourth accused and the consideration for this deed is stated in it to be the amount due for principal and interest on a promissory note dated the 10th August 1902, alleged to have been executed by the first accused's deceased husband in favour of the 4th accused for Rs. 2,400. The deed further recites that the executant, the first accused, received Rs. 1,500 out of the Rs. 3,000 from the third accused for payment to the fourth accused towards the amount due on the promissory note. In a suit for maintenance instituted by the complainant against the first accused in the District Munsif's Court of Tirupattur, No. 1062 of 1909, the first accused

Sessions Judge of North Arcot v. Ramaniammal.

pleaded, apparently with reference to the extent of the property in her hands liable for complainant's maintenance that she owed a debt of Rs. 3,000 to the 3rd and 4th accused on the mortgage mentioned above. She summoned the 4th accused to produce the mortgage deed and the promissory note and in obedience to the summons they were produced by him.

The case for the prosecution is that the promissory note of the 10th August 1902 is a forged document and that no debt was due by the first accused's husband to the 4th accused. The charges against the 1st accused are abetment of forgery of a valuable security (*i.e.*, the promissory note) and fraudulently using the same, under Ss. 468 and 109, Indian Penal Code, and S. 471, Indian Penal Code. The 2nd, 3rd and 5th accused are charged with abetment of the forgery of the promissory note, the 2nd accused was the writer, and the 5th accused the attestor of the promissory note. And the charges against the 4th accused are forgery of the promissory note and fraudulently using the same as genuine.

The learned Assistant Sessions Judge is of opinion that the commitment of all the accused is illegal. With regard to the 1st accused, the objection to the commitment according to him is that the prosecution was not maintainable without the sanction of the District Munsif's Court of Tirupatur, as the offences of abetment of forgery and using a forged document as genuine were committed by a party to O. S. No. 1062 of 1909 in court in respect of a document produced in that suit. The Assistant Sessions Judge is obviously right in holding that an offence under S. 463, Indian Penal Code, mentioned in Clause (*c*) of S. 195, Criminal Procedure Code, covers an offence under S. 468, Indian Penal Code, the object of mentioning S. 463 in S. 195 (*c*), Criminal Procedure Code being to include all cases of forgery, whatever the nature of the fraudulent intention may be—*Tani Shah* v. *Bolahi Shah*[1] and *Queen-Empress* v. *Tulja*[2].

The commitment of the 4th accused for forgery of the promissory note and fraudulently using the same as genuine has next to be considered. With respect to the latter count it is contended that the production of the document in obedience to

1. (1909) 14 C.W.N. 479. 2. (1887) I. L. R. 12 Bom. 36.

Sessions Judge of North Arcot v. Ramaniammal.

an order of the District Munsif's Court does not amount to using it as genuine. This contention is sound. The 4th accused was bound to produce the promissory note and would have been punishable under S. 175, Indian Penal Code, if he had failed to do so. An involuntary production of a document in court cannot be said to amount to any user of it. It was contended for the prosecution before the Assistant Sessions Judge that, apart from its production in the District Munsif's Court, the promissory note was used for giving a colour of validity to the mortgage deed, but we doubt whether this argument can be upheld. Assuming that the promissory note was forged before the mortgage deed was brought into existence, there was nothing done with the promissory note at the time of the execution of the mortgage deed, and it was not used in any way. If both the documents were got up at the same time then they were part of the same transaction and the promissory note could not have been said to be used in any manner for the purpose of executing the mortgage document. The expression 'using a document' is apparently used in the sense of its being put forward in some way for one of the purposes mentioned in S. 463, Indian Penal Code.

It is, however, not necessary to decide about the validity to the objection to the maintainability of the charge of user before the document was produced in court as the commitment on this charge must be quashed on another ground which applies equally to the charge of forgery as against the 4th accused as well as against the accused Nos. 2, 3, and 5. That ground is that the promissory note and the mortgage bond were both executed in the village of Varatnapalli within the jurisdiction of the Sessions Court of the Salem division. The Assistant Sessions Judge held that the commitment would be illegal as the Magistrate having local jurisdiction over an offence committed at Varatnapali was the 2nd Class Magistrate of Kristnagiri in the Salem district. In so holding his attention was apparently not drawn to S. 531, Criminal Procedure Code, which lays down that no order of any criminal court shall be set aside merely on the ground that the inquiry in the course of which it was passed took place in a wrong sub-division or local area unless it appears that such error has in fact occasioned a failure of justice.

Sessions Judge of North Arcot v. Ramaniamal.

An order of commitment is an order within the meaning of this section—see *Queen-Empress* v. *Shahu* [1], *Queen-Empress* v. *James Ingle* [2] and *Queen-Empress* v. *Abbi Reddi*.[3] But it must be held that the commitment to the Sessions Court of North Arcot was illegal. Under S. 177, Criminal Procedure Code, every offence shall ordinarily be inquired into and tried by a court within the local limits of whose jurisdiction it was committed. The offence was therefore triable by the Sessions Court of Salem and not by the Sessions Court of North Arcot. According to S.213, Criminal Procedure Code, 'a Magistrate may make an order committing the accused for trial by the High Court or the Court of Session as the case may be'. The expression 'the Court of Session' here can only mean the Court of Session having jurisdiction to try the case under S. 177, Criminal Procedure Code. S. 63 of Act X of 1872 provided that 'Magistrates shall ordinarily commit to the Court of Session for the sessions division in which the district to which they are appointed is situated.' But the present Criminal Procedure Code contains no similar provision. The Bombay High Court, in *Queen-Empress* v. *Shahu*,[1] held that the commitment should be to the court empowered to try the case under S.177, Criminal Procedure Code. The learned Judges in that case, having to deal with a commitment made to a court not having such jurisdiction, did not quash the commitment but directed the transfer of the case to the court having jurisdiction. But the Privy Council has pointed out in *Ledgard* v. *Bull* [4] that a transfer from a court having no jurisdiction would not render the proceeding legal. The Allahabad High Court, in *Queen-Empress* v. *Ramdei*[5] followed a similar course. *Ledgard* v. *Bull*[4] was apparently not brought to its notice. We do not, therefore, think that we would be justified in upholding the commitment and directing the transfer of the case to the Sessions Court of Salem. We must hold that the commitment is illegal, and set aside the order of the Sub-Magistrate of Tiruppatur. As we are informed that an appeal against the judgment the District Munsif's Court of Tiruppatur in Original Suit No. 1062 of 1909 is still pending we do not consider it necessary to pass any further order in the case at present.

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1. (1884) I.L.R. 8 B. 312. 2. (1891) I.L.R. 16 B. 200.
3. (1894) I.L.R. 17 M. 402. 4. (1886) I.L.R. 9 A. 191.
5. (1896) I.L.R. 18 A. 350.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Abdur Rahim.

Mullaseri Gapala Menon .. Appellant *
v. (*Counter-Petr.*)
Krishekai Kovilakath Manavikraman *alias*
Anujan Rajah Avergal .. Respondent
(*Petitioner*).

Gapala Menon *v.* Anujan Rajah.

Limitation Act, Art. 182—"Application in accordance with law—Application for execution of attached decree.

The effect of the attachment of a decree is only to prevent an alienation of it; and an application to execute an attached decree by the decree-holder thereof is an application in accordance with law.

Appeal from the decree of the Subordinate Judge's Court of South Malabar at Palghat in A. S. No. 761 of 1910 presented against the order of the Court of the District Munsiff of Alatur in Civ. Mis. Petition No. 1112 of 1910.

S. Swaminadhan for appellant.

T. R. Ramachandra Aiyar for respondent.

S. Swaminadhan:—If a person's decree is attached, he connot thereafter execute, and any application to execute is useless and will not be a step in aid of execution—*Thuchakovil Unni Koya* v. *Arapayil Pathuti Umma* [1]; *Munavar Hussain* v. *Jani Bijai Shanker* [2]; *Purnachandra Mandal* v. *Radha Nath Das* [3]. The case of *Sami Pillai* v. *Krishnasami Chetty* [4] is distinguished in *Thuchakovil Unni Koya* v. *Arapayil Pathuti Umma* [1].

T. R. Ramachandra Aiyer:—Attachment does not debar me from filing an execution application; it only stays execution. [*Abdur Rahim* J.:—You cannot put in an application merely to keep alive the decree—see S. 232, C. P. C.] That is only where the decree is transferred to another court. Here the court is the same and no order staying execution can be made. *Vide* the two parts of S. 273. In *Thachakovil Unni Koya* v. *Arapayil Pathuti Umma* [1] it was assumed that there was a stay

* A. A. A. O. No. 16 of 1911. 22nd November 1911.

1. (1911) I. M. W. N. 187.
2. (1905) I. L. R. 27 A. 619.
3. (1906) I. L. R. 33 C. 867.
4. (1897) I. L. R. 21 M. 417.

under the circumstances of the case. The prohibitory order is not one prohibiting execution but only payment or receipt of money due.

Gapala Menon v. Anujan Rajah.

S. Swaminadhan replied.

The Court delivered the following

JUDGMENT :—The first question argued before us relates to limitation and arises upon the facts. One Seshan Pattar was sued in the District Munsif's Court at Alatur, in 1904, by the present appellant and the latter recovered a decree for payment of money but the decree was reversed by the Subordinate Judge's Court of Palghat on the 3rd September 1904. Before the judgment of the appellate court, however, was passed, the appellant had executed the original decree against Seshan Pattar. Then it appears the assignor of the respondent in this appeal instituted a suit in 1906, in the District Munsif's Court at Alatur and attached before judgment the right of Seshan Pattar to the restitution of the property recovered from him by the appellant under the decree of the appellate court dated 3rd September 1904. The application for execution, which the District Munsif found would save limitation, was made by Seshan Pattar's sons on the 30th August 1907. At the time of the application the decree had been attached as already stated, and the question is whether the application which was dismissed on the ground that the decree was under attachment and could not therefore be executed, can be regarded as an application according to law as a step in aid of execution. The learned counsel for the appellant has strongly relied, in support of his contention that the application was not in accordance with law, on the case of *Thuchakovil Unni Koya* v. *Arapayil Pathuti Umma* [1]. But that was a case in which the attachment was under the second paragraph of S. 273 of the Code of 1882. But the provisions of this paragraph cannot be applied to the present case, for it is the same court, *i.e.*, the District Munsif's Court of Alatur, which passed the decree sought to be executed and which has to execute the decree of the Subordinate Judge's Court of Palghat which is under attachment. This case would rather seem to be covered by the first part of the penultimate

1. (1911) 1 M. W. N. 187.

Gopala Menon v. Annjan Rajah.

paragraph of S. 273, which does not direct stay of the execution of the attached decree. Even if that provision does not apply, the only effect of the attachment would be to prevent alienation. Nor is there anything in the terms of the order passed on the application for attachment which forbids the decree-holder from proceeding. We therefore hold that the application of the 30th August 1907 was in accordance with law.

The second point argued by Dr. Swaminadhan is that a right of restitution arising out of a reversing decree cannot be enforced in execution. But S. 14 of the present Civil Procedure Code which governs the question makes it quite clear not only that such a right can be enforced in execution but that no suit shall lie for the purpose.

The result is the appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

R. M. Swaminatha Naicker .. Appellant*
v. (*in A. A. O. No.* 206 *and Petr. in C. R. P. No.* 542)
R. P. Paul and others .. Respondents.

Swaminatha Naicker v. Paul.

C. P. C., S. 114, *O. XXI, r.* 89—*Review—Jurisdiction of civil court to review an order dismissing an application under O. XXI, r.* 89, *for default.*

A civil court has got the power to review an order dismissing for default an application under O. *XXI*, r. 89.

Civil Miscellaneous Appeal against the order of the Madras City Civil Court in C. M. P. No. 589 of 1902 in E. P. No. 451 of 1909.

Petition under S. 115 of Act V of 1908, praying for revision of the order of the City Civil Court in C. M. P. No. 758 of 1909.

K. Balmukunda Aiyar for appellant.

A. D. Zaccheus and *T. Narasimha Aiyangar* for respondents.

The Court delivered the following

JUDGMENT:—In this case, the City Civil Judge at first dismissed for default an application by a judgment-debtor under Order XXI, Rule 89, C. P. C. Subsequently, on application

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* A. A. O. No. 206 of 1909. 6th September, 1911.
C. R. P. No. 542 of 1909.

made by him, the Judge re-heard the petition for setting aside the sale and cancelled the sale, the judgment-debtor having paid the deposit required by the rule above referred to. The purchaser prefers this appeal against the second order of the City Civil Judge setting aside the sale. It is contended that the learned Judge had no jurisdiction to set aside his former order dismissing the judgment-debtor's application for default and that Order IX, Rules 9 and 4, of the C. P. C. are not applicable to applications for execution. The learned Judge did not pass the order under either of these rules, but he held that he had the power to do so apart from these rules, and he refers to S. 151 of the C. P. C. as justifying his action. It is unnecessary to decide whether the principle of Order IX, Rules 9 and 4, would be applicable to execution proceedings or not, and whether the order of the lower court would be warranted by S. 151 of the C. P. C. There can be no doubt that the lower court could have set aside its former order on an application for review. The judgment-debtor's application was that, for the reasons stated in the affidavit, the former order should be set aside. If the court had power, as we hold it had, to set aside the order on review, it was quite open to the lower court to treat the application as one made under that section, and it is open to us to uphold the order on the ground that it could have been passed on review. On the merits, we see no reason to differ from the conclusion arrived at by the learned Judge. We dismiss the appeal with costs of the 2nd respondent.

Swaminatha Naicker *v.* Paul.

The revision petition is also dismissed but without costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

K. P. A. D'Coutha and another .. Petitioners* (*Defendants*)

v.

J. P. Assan Kunhu .. Respondent (*Plaintiff*).

D'Coutha *v.* Assan Kunhu.

Internation law (Private)—Pledge of kuri chit in foreign territory—Suit and execution sale of chit—Property situate beyond foreign territory in British India.

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* C. R. P. No. 790 of 1909. 24th February, 1911.

D'Coutha v. Assau Kunhu.

If a foreign law allows a pledge of movable property or of a debt, there is nothing to prohibit a court of the same territory from selling the property in execution so as to pass a valid title to it, even if the property is situate outside the jurisdiction at the time. [*Ganshamlal* v. *Bhansali*[1] commented on.]

Petition under S. 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the District Judge of South Malabar in A. No. 307 of 1909 presented against the decree of the Court of the District Munsif of Tangasseri in O. S. No. 10 of 1908.

P. Kundu Panikar for petitioners.

V. Visvanatha Sastri for respondent.

The Court delivered the following

JUDGMENT :—What happened in this case was that the respondent, a subject of the Travancore Government, to whom one Matheru, also a subject of the Travancore Government, had mortgaged his rights under a kuri chit which he held against the petitioner, an inhabitant of this presidency enforced his mortgage and bought his judgment-debtor's interest in the chit in a sale held by the Travancore court in pursuance of the mortgage decree. It is contended that the sale by the Travancore court of Matheru's interest in the chit was opposed to the principles of private international law and therefore void. For this position *Ganshamlal* v. *Bhansali*[1] is cited as an authority. There the learned Judges held that a court of British India had no jurisdiction to attach in execution of a decree of a British Indian court a debt which was due from a person, a subject of a Native State, to the judgment-debtor, a subject of British India. The case may be distinguished from this case on the ground that there is no question of realising in execution of a decree property which is situate in a foreign territory. The plaintiff in the present case instituted his suit in the very territory where, according to the petitioner himself, the property is situate, *i.e.*, in the Malabar District. No doubt *Sargent* J. bases his decision on a general proposition which, if understood in its widest application, might cover this case, *viz.*, that "an attachment of a debt due from a subject of a foreign territory would be virtually an attempt to interfere in the interest of a third person in the jural relations arising out of a cause of action over which *ex hypothesi* no court in British

1. (1881) I. L. R. 5 B. 249.

India has or even claims jurisdiction." But the observation must be understood with reference to the nature of the process provided by particular sections of the Civil Procedure Code for attachment of a debt. However that may be, we fail to understand why, if, as it is conceded, there is no principle of International Law which prevents a pledge of movable property or of a debt, supposing it is allowed by the law of the territory where the transaction took place, the court of that territory should be unable to sell the property in execution of its decree so as to pass a valid title to it, if the property is situate out of its jurisdiction. We may observe that the kuri receipt was in Travancore at the time of its pledge. The case cited in DICEY'S *Conflict of Laws* p. 524 (2nd Edition) seems to us to be clearly in support of the view we have suggested. See also *North Western Bank* v. *Poynter, Son and Macdonald* [1]. The objection taken by the petitioner to the judgment of the lower court fails and the petition is dismissed with costs.

D'Containtha v. Assan Kunhu.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim.

Natuwath Pappu *alias* Valia Achan. .. Petitioner * (*Plaintiff*)

v.

Kolli Vallappil Kalathile Vittil Karnavan Ravunni Nair and another .. Respondents (*Defendants*).

T. P. A., S. 76—Enhanced revenue—Mortgagee's duty to pay.

The mortgagee in possession is the person bound to pay the enhanced revenue in the absence of a contract to the contrary. [*Krishnier* v. *Arapulli Iyer* [2] distinguished.

Valla Achan v. Ravunni Nair.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate Judge's Court at Palghat in S. C. S. No. 1270 of 1908.

C. Madhavan Nair for petitioner.

R. Govinda Marar for respondents.

C. R. P. No. 235 of 1909. 18th August, 1911.

1. (1895) C. A. 56.
2. (1902) 14 M. L. J. 488.

Valia Achan v. Ravunni Nair.

The Court delivered the following

JUDGMENT:—I think the Subordinate Judge is right in holding that the defendant was liable to pay the enhanced revenue. Under the general law the mortgagee is to pay the Government revenue unless there is a contract to the contrary. Exhibit A does not evidence any contract to the effect that the burden of enhanced revenue is to fall on the plaintiff. The authority of *Krishnier* v. *Arapulli Iyer* [1] is invoked by the learned vakil for the respondents, but that decision is based on the terms of the particular document which the learned Judges had to construe in that case and cannot help us in the construction of the mortgage deed Exhibit A.

The Subordinate Judge, while laying down the law correctly, has decided against the plaintiff on the ground that he failed to prove that enhanced revenue was payable on account of the lands under kanom. But the plaint distinctly alleges this and the written statement, far from traversing the allegation, seems to assume that enhanced revenue was payable on account of the land. The issues also make it clear that the fact that enhanced revenue was payable is actually found for plaintiff and was never disputed.

That being so the learned Subordinate Judge erred in dismissing the suit on that ground.

The decree of the Subordinate Judge is set aside and there shall be a decree for the plaintiff for Rs. 182-15-9 with interest thereon at 6 per cent. from the date of the institution of the suit till the date of realisation. The defendant shall bear the costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Gopalsami Iyer .. Appellant* (*Plaintiff*)

v.

Subramania Sastri .. Respondent (*Defendant*).

Gopalsami Iyer v. Subramania Sastri.

Limitation Act, Arts. 49, 145—*Suit for return of jewel given to procure loan after discharge of loan.*

Mere silence on the part of a person without replying to a demand for specific moveable property may not amount to a refusal.

* S. A. No. 190 of 1909. 20th April, 1911.

1. (1902) 14 M. L. J. 488.

Gopalsami Iyer *v.* Subramania Sastri.

Plaintiff handed a jewel to defendant for procuring a loan from another by pledge. Defendant did so. Plaintiff paid off the debt through defendant who got back the jewel and retained it. *Held* that in the absence of an agreement that the jewel should remain in deposit with the defendant after repayment of the loan, Art. 145 would not apply and that Article 49 was applicable.

Second appeal from the decree of the Subordinate Judge's Court of Kumbakonam in A. S. No. 471 of 1909, presented against the decree of the Court of the District Munsif of Mannargudi in O. S. No. 49 of 1908.

This suit which was for recovery of certain jewels or their value from the defendant to whom they were once given by the plaintiff was dismissed as barred by limitation under Article 49 of the Limitation Act.

S. Krishnamurthi Aiyar for appellant.

S. Srinivasa Aiyar for respondent.

S. Krishnamurthi Aiyar:—A deposit has been made; so Art. 145 and not Art. 49 of the Limitation Act applies.

S. Srinivasa Aiyar:—Art. 89 applies. I was the agent of the plaintiff for procuring a loan on the jewels. I am not therefore a depository. My agency terminated as soon as I procured the loan. When the jewels were returned to me I was not the agent for the return. My express refusal was in 1900; the demand was in 1904; and the suit in 1908. [*Sundara Aiyar* J.—It could hardly be said that when they were returned to you, it was intended that you should keep them for yourself.] Even if I be the agent for returning, my silence after a proper demand to return, is equivalent to refusal—*Hari Narain Ghose* v. *Administrator-General of Bengal*[1]—and it is more than 3 years since such silence.

S. Krishnamurthi Aiyar in reply.—There must be a definite and express refusal—see *Gopalchandra Bose* v. *Surendranath Dutt*[2].

The Court delivered the following

JUDGMENT:—The plaintiff handed over the jewel to the defendant to procure a loan for the plaintiff. The defendant obtained the loan. After the plaintiff had paid it off, the defendant, who got back the jewel, retained possession of it. The plaintiff made a demand on defendant for the return of it by

1. (1878) 3 C.L.R. 446.

2. (1908) 12 C.W.N. 1010, at 1014.

Gopalsami Iyer v. Subramania Sastri.

Exhibit B on 18th August 1904. The defendant's refusal to return was on 29th April 1906 (Exhibit III) and the suit was instituted on 18th February 1908, *i. e.*, within three years after the defendant's refusal. The plaint does not allege that there was an agreement that the jewel should remain in deposit with the defendant after the re-payment of loan. Article 145 of the Indian Limitation Act, 1908, would, therefore, apparently be inapplicable. But the defendant must be taken to have held possession of the jewel on behalf of the plaintiff until the date of Exhibit III. We are, therefore, of opinion that under Article 49 of the Indian Limitation, Act, 1908, the suit is not barred by limitation. We are unable to agree with Mr. Srinivasa Aiyar's contention that mere silence on defendant's part when he received Exhibit B would on this account amount to refusal. See *Gopal Chandar Bose* v. *Surendranath Dutt*[1]. We reverse the decree of the lower appellate court and restore that of the Munsif with costs both here and in the lower appellate court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Abdur Rahim.

Ismail Ghami Ammal .. Petitioner*

v.

Katinna Rowther and others .. Respondents.

Ismail Ghami v. Katinna Rowther.

Cr. P. C., S. 145—Possession—Possession of receiver held to be possession of party.

Held that the possession of the Receiver from the date of his appointment in the case was possession on behalf of the party who should ultimately be found by the Magistrate to have been in possession prior to the date of the Receiver's appointment for purposes of S. 145, Cr. P. C.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of the Sub-Divisional Magistrate of Karur dated the 30th June 1911 in Miscellaneous Case No. 5 of 1911.

W. Barton for petitioner.

Dr. Swaminadhan for respondents.

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* C. R. C. No. 500. 27th November, 1911.
C. R. P. No. 376 of 1911.

1. (1908) 12 C.W.N. 1010 at 1014.

The Court made the following

Ismail Ghami v. Katinna Rowther.

ORDER:—We think that in the state of facts which are found in this case the possession of the Receiver appointed on the 4th April 1909 may, for the purpose of S. 145 of the Cr. P. C., be properly regarded as possession on behalf of the party who should ultimately be found by the Magistrate to be in possession immediately before the 4th April just as for purposes of limitation the possession of the Receiver is held to be the possession of the party entitled to possession—*Raja of Venkatagiri* v. *Isakapalli Subbiah*[1] and *Jayanti Kumar Mookerjee* v. *Middleton*[2].

To hold otherwise would be to hold that neither of the parties nor the Receiver is in possession and this would lead to the very scramble for possession and probable breach of the peace which it is the purpose of the law to prevent. We must, therefore, dismiss the petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Spencer.

In re V. Velu Nattan .. Petitioner* (*Complainant*).

Velu Nattan *In re*.

Cr. P. C., Ss. 200 (*a*), 203, 537—*Omission by Presidency Magistrate to examine complainant before dismissing case under S.* 203—*Irregularity.*

An omission by a Presidency Magistrate to examine the complainant before dismissing a complaint under S. 203, Cr. P. C. is at the most an irregularity within the meaning of S. 537, Cr. P. C., even assuming that a Magis should do so.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of the Presidency Magistrate's Court, Georgetown, Madras, in Application No. 2991 dated the 10th May 1911.

P. Sambandham for petitioner.

The Public Prosecutor (*C. F. Napier*) for the Crown.

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* C. R. C. No. 333 of 1911. 29th September, 1911.

* C. R. P. No. 258 of 1911.

1. (1902) I.L.R. 26 M. 410.

2. (1900) I.L.R. 27 C. 785.

Velu Nattan *In re.*

The Court made the following

ORDER:—It is argued that the Presidency Magistrate had no power to dismiss a complaint under S. 203, Cr. P. C., without examining the complainant. It was held in *Queen-Empress* v. *Murphy*[1] that a verification on oath of a complaint before a Magistrate was a sufficient compliance with the provisions of S. 203 and this has been followed in Cr. Rev. C. 308 of 1908 on the file of this court with special reference to the procedure provided for Presidency Magistrates under S. 200 (*a*). In the present case the petitioner's vakil was present when the Magistrate passed orders under S. 203, Cr. P. C., dismissing the complaint and in the absence of any affidavit saying that he was precluded from showing cause against accepting the result of the police enquiry, I am not prepared to find that the complainant was in any way prejudiced by the Magistrate's procedure assuming that the law required him to make a more detailed examination. At the most the omission to examine in this case amounts to no more than an irregularity of the description covered by S. 537, Cr. P. C. The petition is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Mutyala Papayya .. Appellant* (*Plaintiff*)

v.

Kosuri Muramullu .. Respondent (*Defendant*).

Mutyala Papayya *v.* Kosuri Muramullu.

Madras Acts—Hereditary Village Offices Act—Act III of 1895, *S.* 3, *Cls.* (3) *and* (4)—*Interpretation—Jurisdiction of Revenue courts—Village Carpenter's claim.*

Revenue courts have jurisdiction to try a claim to the office and emoluments of a village carpenter in a proprietary estate.

Cl. (4) of S. 3 comprises a distinct class of offices as distinguished from Cl. (3) of S. 3 and the offices mentioned in Cl. (4) do not really form an exception to the applicability of the Act itself.

The object of the draftsman in grouping the offices in S. 3 into 4 groups is merely to classify them under convenient heads for the purpose of dealing with them in different sections with reference to the questions of succession, punishment, etc., of village officers, artizans and servants. S. 5 is intended to

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* S. A. No. 1044 of 1910. 29th November, 1911.

1. (1887) I.L.R. 9 Al. 666.

Mutyala Papayya v. Kosuri Muramullu.

re-enact the rule of inalienability embodied in Reg. VI of 1831 which was repealed by Act III of 1895; and there can be no conceivable reason why the legislature would not have intended not to declare the inalienability of emoluments attached to the offices in Cl. (4) of S. 3 [*Chinnayya Asari* v. *Annajappa Mudali* [1] not followed.]

Second appeal from the decree of the Subordinate Judge's Court of Cocanada in A. S. No. 143 of 1909 presented against the decree of the Court of the District Munsif of Cocanada in O. No. 215 of 1909.

Ram Doss for *Narayanayamurthi* for appellant—cited *Chinnayya Asari* v. *Annajappa Mudali*[1] which dissents from the assumption in *Raja of Vizianagaram* v. *Dantiveda Chelliah*[2], that carpenter's service inam does not come within the prohibition contained in S. 21.

V. Ramesam, for respondent, submitted that the construction put upon S. 3, Cl. (3) was not warranted by the language. There was no reason also why distinction ought to be made between one class of village service inam and another. There is an object in making the classification because certain sections are applicable only to such inams. He brought to their Lordships' notice C. M. A. 220 of 1904 which holds the same view as taken in *Chinnaya Asari's case*[1] but no reasons are given for the view.

The Court delivered the following

JUDGMENT :—The question argued in this second appeal is whether Revenue courts have jurisdiction to try a claim to the office and emoluments of a village carpenter in a proprietary estate. Both the lower courts hold that they have and we are of opinion that they are right.

Mr. Ramadoss, for the appellant, contends that S. 3 of the Madras Hereditary Village Offices Act III of 1895 excludes from the operation of the Act the office of a village carpenter and the other offices mentioned in sub-clause (4). The section divides into four classes the village offices to which the Act is applicable. The third class is mentioned in sub-clause (3) in these terms: 'Other hereditary village offices in proprietary estates except (1) the offices forming class (4) below.' Then the fourth class runs thus—'The hereditary offices of village artizans and

1. (1909) 7 M. L. T. 264.

2. (1905) I. L. R. 28 M. 84.

Mutyala Papayya. v. Kosuri Muramuju.

village servants such as the following.' The first office enumerated is the village carpenter. The argument for the appellant is that inasmuch as Cl. (3) mentions as offices to which the Act applies 'other hereditary village offices in proprietary estates except the hereditary offices of certain village artizans and village servants' it cannot be applied to those that are thus excepted. But what is excepted is included in the next sub-clause. The object of excepting the offices mentioned in sub-clause (4) from sub-clause (3) was to form them into a separate class as, according to the scheme of the Act, it was intended to deal with questions relating to succession and other matters relating to the offices included in sub-clause (3) and sub-clause (4) separately. The object of the exception was to carve out a smaller class for the purpose of making special provision for offices in that class with respect to succession and other matters. It is true that clause (3) speaks of other hereditary village offices in proprietary estates except those included in clause (4) and that clause (4) does not expressly speak of the hereditary offices of village artizans and village servants in proprietary estates. At the same time it is not confined in express terms to hereditary offices of village artizans and village servants in non-proprietary estates. It will be observed that succession to offices mentioned in clauses (1), (3) and (4) is dealt with separately in that Act. S. 10 deals with the offices forming class 1; S. 11 with offices forming class 3, and S. 12 with those forming class 4. The subject of the control and punishment of village officers is also dealt with separately in Ss. 7 to 9. None of such provisions, it may be noted, has reference to Cl. (4) in S. 3. It is quite clear to our minds that the object of the draftsman was merely to group the offices under convenient heads for the purpose of dealing with them in different sections with reference to the questions of succession, punishment, etc., of village officers, artizans and servants. The result of upholding the appellant's contention would be that the emoluments attached to the offices mentioned in Cl. (4) of sub-section 3 would not be declared inalienable under S. 5 of the Act. There can be no doubt that the emoluments of all public offices of the kind were declared inalienable by Regulation VI of 1831. That provision was repealed by Act III of 1895,

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1. (1909) 7 M.L.T. 264.

2. (1905) I.L.R. 28 M. 84.

Mutyala Papayya *v.* Kosuri Muramullu.

and S. 5, we have no doubt, was intended to re-enact the rule of inalienability embodied in that Act. We can conceive of no reason for supposing that the legislature could have intended not to declare the inalienability of emoluments attached to the offices mentioned in cl. (4) in S. 3. Our attention has been drawn to a judgment of *Munro* and *Abdur Rahim* JJ. in *Chinnaya Asari* v. *Mooniappa Mudalli*[1]. That judgment is no doubt in the appellant's favour. But it is an extremely short one. The learned Judges say 'we have no doubt that the District Judge has properly considered S. 3 of Act III of 1895. No reasons are given by the learned Judges themselves for the conclusion they arrived at. In *Raja of Vizianagaram* v. *Dantiveda Chelliah*[2] the learned Judges who decided that case proceeded on the assumption that a carpenter's inam was covered by S. 5 of Act III of 1895. Reference is made to it in the later case of *Chinnaya Asari* v. *Mooniappa Mudali*[1] and it is said that the fact that the office was that of a village carpenter in a proprietary estate seems to have escaped notice. It is hardly likely that such was the case though no doubt it was not argued that the emoluments of such an office were inalienable. For the reasons given above we are unable with all deference to agree with the judgment in *Chinnaya Asari* v. *Mooniyappa Mudali.*[1]

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Kosuri Rajagopala Raju and others .. Appellants* (*Defendants*)

v.

Datla Radhayya and others .. Respondents (*Plaintiffs*).

Rajagopala Raju *v.* Radhayya.

Contract—Suit on, by stranger not party to the contract—Hindu Law—Family settlement.

Where, at a partition between the members of a joint Hindu family, provision is made for female members of the family, the female members are entitled to the benefit of the provision and to sue upon it. [*Shuppu Ammal* v. *Subramaniam* [3]; *Arumuga Goundan* v. *Chinnammal.*[4] followed].

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* S. A, No. 1284 of 1910. 30th November, 1911.

1. (1909) 7 M. L. T. 264.
2. (1905) I.L.R. 28 M. 84.
3. (1909) I.L.R. 33 M. 238.
4. (1911) 10 M.L.T. 214.

Rajagopala Raju v. Radhayya.

Second appeal from the decree of the Court of the Subordinate Judge of Kistna at Ellore in A. S. No. 223 of 1909 presented against the decree of the Court of the District Munsif of Narasapur in O. S. No. 235 of 1908.

P. Narayanamurthi for appellants.

V. Ramesam for respondents.

The Court delivered the following

JUDGMENT:—The plaintiff and defendants Nos. 1 and 2 are sisters of defendant Nos. 3 to 5. By an instrument of partition entered into between defendants Nos. 3 to 5 it was stipulated that certain land was to be enjoyed by the mother of the parties for her life and to be taken by her daughters, that is the plaintiff and defendants Nos. 1 and 2, after her death. The mother is now dead. This suit by the plaintiff is to recover one third of that property, defendants Nos. 1 and 2 being entitled to the remaining two-thirds.

Defendants Nos. 3 to 5, the brothers, contend that the plaintiff, not being a party to the partition instrument, has no cause of action for the recovery of the property. They plead that by a subsequent arrangement soon after the partition they cancelled the allotment to the mother and sisters. It was suggested during the course of the argument here that the partition deed never became operative but we do not read the written statement as raising this question. The issue was whether the arrangement was subsequently cancelled, The lower appellate court has given the plaintiff a decree and defendants Nos. 3 to 5 are the appellants in this court.

We are of opinion that the decision appealed from is right. To the general rule that persons who are not parties to a contract have no right of action based on it, there are several exceptions. The Privy Council has recently pointed out that the rule must be applied to this country with considerable exceptions. In that case a Muhammadan wife was held entitled to sue upon a contract entered into between her father and her husband's father before the marriage. We are of opinion that, where at a partition between the members of a joint family provision is made for female members of it, it must be held that as the contract was entered into for the benefit of those who are provided for in the

Rajagopala Raju v. Radhayya.

instrument of partition, they are entitled to the benefit of it and to sue upon it. This principle has been affirmed by this court in *Shuppu Ammal* v. *Subramaniam*[1]. See also *Arumuga Goundan* v. *Chinnammal*[2]. The decisions of other High Courts have also affirmed the principle. See *Rukhmabai* v. *Govind Moreshwar*[3]; *Protab Narain Mookerjee* v. *Sarat Kumari Debi*[4].

The exceptions are not confined to cases where one or other of the parties to the contract can be said to have made himself a trustee for strangers who claim to sue on it. In POLLOCK on *Contracts* four exceptions are stated. The third class of exceptions, according to the learned author, is the case of trusts. Then he mentions another and distinct class. To quote his own words: "Closely connected with the cases covered by the doctrine of trusts, but extending beyond them, we have the rules of equity by which special favour is extended to provisions made by parents for their children." In HALSBURY'S *Laws of England*, Vol. VII, page 344, S. 711, the case of marriage settlement is treated as included in the case of trusts. SIR FREDERICK POLLOCK'S classification commends itself better to us. It may be observed that the general statement in HALSBURY'S *Laws of England* that another exception to the rule is recognised in cases where the contract is intended to secure a benefit to a person who is not a party to it will cover cases which are not comprised in trusts. It is usual amongst Hindus to allot portions to sisters at a partition between brothers. In the document in this case the provision for the plaintiff and her sisters is stated to be for *pasupukunkumam*. We find no difficulty in holding that sisters are within the equity of a family settlement amongst Hindus. The allotment of the land in this case was made for the benefit of the plaintiff and her sisters. They are persons for whom it was the moral duty of the parties to the instrument to provide. We are of opinion, therefore, that the plaintiff's right to sue was rightly upheld.

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Kuppusami Iyengar and another .. Appellants* (*Plaintiffs*)

v.

Subbaraya Rowtha Minda Nainar & another Respondent (*Defendants*).

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* A. A. O. Nos. 120, 121, and 122, of 1910. 15th November 1911.

1. (1909) I.L.R. 33 M. 238.
2. (1911) 10 M.L.T. 214.
3. (1904) I.L.R. 6 Bom. L.R. 421.
4. (1900) 5 C.W.N. 386.

Kuppusami Iyer v. Subbaraya Rowtha.

C. P. C., O. XXI, *r.* 53—*Mortgage decree—Attachment and purchase of, in execution of decree—Decree-holder-purchaser's rights.*

A decree-holder who attaches and purchases the mortgage-decree of the judgment-debtor is the latter's representative and is entitled to execute the attached decree in any manner lawful for the holder thereof, irrespective of what is conveyed to him by the sale certificate.

Appeals from the orders of the Subordinate Judge's Court of Mayavaram at Kumbaconam in O. S. No. 43 of 1893, 33 of 1893 and 35 of 1895, respectively, on the file of the Subordinate Judge of Kumbaconam.

In this case the appellant had a mortgage of certain mortgage decrees against the respondents. Appellant having obtained a mortgage decree in his favour brought to sale those decrees in execution and bought in court auction several items of land mentioned in the mortgage decrees. At a previous stage of this litigation it was pointed out by the High Court that it was irregular to sell one decree in execution of another decree and that further execution must be only by executing those original decrees. So in further execution of his decree this appellant applied for execution of those decrees. His application was dismissed on the ground that the appellant had fully executed his decree and got a sale certificate in his name in respect of certain specific properties in court auction and that he had no right now to proceed against items which were not comprised in the sale certificate.

C. V. Anantakrishna Aiyar for appellant:—Having bought the rights of my mortgagor I am entitled to proceed to execute his decrees. Even if the sale certficate omits some lands I am entitled to sell as it gives the four boundaries. The boundaries prevail in spite of the wrong extent—see AMIR ALI'S *Evidence*, 5th Edn., p. 618, for cases collected on the point. A mortgage is to that extent an assignment; mortgage is defined as a 'transfer' in S. 54, Transfer of Property Act. Under S. 232, C. P. C., the transfer need not be absolute—*Pasupathy Aiyar* v. *Kothanda Rama Aiyar* [1]; *Ramasawmi Pillai* v. *Muthu Chetty*[2]. See also S. 25 of Judicature Act of 1873.

K. Ramachandra Aiyar for respondent:—The sale certificate is conclusive in the matter. The certificate does not cover the items now sought to be sold. What was bought was only the mortgagor's right in some of the properties of the original

1. (1904) I.L.R. 28 M. 64. 2. (1910) M.W.N. 4.

mortgagors, *i. e.*, the original judgment-debtors, and not the decrees themselves. When the sale certificate mentions the items specifically, the boundaries will be immaterial. The other side did not contend in the lower court that all that was contained in the boundaries was sold but relied only on the sale certificate. A partial transfer of a decree will not enable the transferee to execute—*Pasupathy Aiyar* v. *Kothanda Rama Aiyar*[1]. After a decree the mortgage is merged in the decree—*Vedapuratti* v. *Valiya Raja*[2]—and so there can be no right as if by assignment. As for boundaries not prevailing I rely on *Kumar Rameshwar Malia* v. *Ram Tarak Harra.*[3]

Kuppusami Iyer *v.* Subbaraya Rowtha.

C. V. Anantakrishna Aiyar in reply :—S. 73 and Rule 184 of the Rules of Practice authorise the execution of one decree in execution of another decree. As for *Pasupathy Aiyar* v. *Kodandarama*[1] the answer is that the present application is under the present C. P. C. which allows execution in favour of partial transferees—O. XXI, r. 60, C.P.C. [*Abdur Rahim* J.:—It is not interest of one of several decree-holders that has been transferred but it is a portion of the decree] *Vedapuratti* v. *Valiya* [2] lays only a dictum

The Court delivered the following

JUDGMENT :—*Abdur Rahim* J.—I think the order of the Subordinate Judge is wrong in so far as it disallows the petition of the appellants who are decree-holders in O. S. No. 62 of 1901 to proceed against the properties not mentioned in the sale certificate dated the 16th December 1904 but included in the decree obtained by the Nadars, the judgment-debtors of the appellant, against the respondents. I have assumed that the properties now sought to be proceeded against are not covered by the sale certificate in question because there is no evidence on record to show that they are, but the decrees obtained by the appellants against the Nadars entitle them to recover the judgment debt from their persons and other properties. The properties in dispute are undisputedly included in the mortgage decrees of the Nadars and so all their rights in those properties are liable to be sold if the decree obtained by the appellants is not satisfied by the sale of the Nadars' interest in the properties hypothecated to them and ordered to be sold under the appellant's decree. O. XXI, r. 53, of the Civil Procedure Code

Rahim J.

1. (1904) I. L. R. 28 M. 65. 2. (1901) I. L. R. 25 M. 300 (F.B.).
3. (1909) 14 C. W. N. 268.

Kuppusami Iyer v. Subbaraya Rowtha.

Rahim J.

which governs this case lays down that the holder of a decree sought to be executed by the attachment of another decree for sale in enforcement of a mortgage or charge shall be deemed to be the representative of the holder of the attached decree and therefore to be entitled to execute such attached decree in any manner lawful for the holder thereof. It was the same Subordinate Court of Kumbaconam that passed the decree obtained by the Nadars against the respondents and the decree obtained by the appellants against the Nadars. Then all that would be necessary for the attachment of the Nadars' decrees, so far as the properties in question are concerned, is to pass an order to that effect and then the appellant can proceed to execute the mortgage decrees of the Nadars. The appeal is therefore allowed with costs here and in the court below and the Subordinate Court will be asked to dispose of the appellant's application for execution according to law.

A. A. O. Nos. 121 and 122 of 1910

These appeals follow appeal 120 of 1910.

A. A. O. Nos. 120, 121 and 122 of 1910.

Spencer J.:—The decree-holders in O. S. Nos. 33 and 43 of 1893 and 35 of 1895 who may for shortness be termed the 'Nadars' mortgaged their interest to the appellants, who may be called the 'Chetties.'

The Chetties brought a suit, O. S. No. 62 of 1901, for sale upon their mortgage and obtained a decree. In execution of this decree there was a court auction at which the Chetties became the purchasers of the hypothecation rights of the Nadars in certain immoveable properties described in the sale certificate in these proceedings.

The Chetties now seek to have sold by the court certain other lands not specified in the sale certificate but covered by the Nadars' decrees. The judgment-debtors in the Nadars' decrees who are respondents in these appeals object that the Chetties are not entitled to exercise, against lands not included in their sale certificate, powers which they have by virtue only of their purchase.

Out of the contentions of the parties two questions arise *viz.*, (1) whether the Chetties, by their right as mortgagees, are entitled, so long as their decree remains unsatisfied, to step into the shoes of the Nadars and execute their decrees against the

Kuppusami Iyer v. Subbaraya Rowtha.

Spencer J.

respondents up to the limit of the Nadars' interest in the mortgaged properties and (2) whether the sale certificate covers the lands now sought to be proceeded against, although by some mistake they may have not been specifically mentioned.

On the second point the appellants rely on the well-known rule that if, in a document, boundaries and extent are at variance, boundaries should prevail. In the second column of the sale certificate boundaries have been given, and these are said to include the whole extent mortgaged under the original decrees. But I find no proof that the lands now sought to be sold lie within these boundaries. Boundaries have been given as the form requires it, but instead of the boundaries of each plot being stated a general description of the whole area sold is entered. In this case the paimash and survey numbers of the plots must be taken as a far more definite specification of what was sold than the boundaries.

As regards the first point it was held by the *Chief Justice* in proceedings between these same parties in *Subbaraya Rowhu Minda Nainar* v. *Kuppusawmi Iyengar* [1] that the mortgage interest under the decree obtained by the Nadars includes the right to sell the property in default of payment and that no order for sale of the decrees obtained by the Nadars was necessary in order to enable the Chetties to execute the decrees which they (the Nadars) had obtained. This view is supported by the ruling in *Tarvadi Bholanath* v. *Baikashi* [2] wherein it was held that the sale of a mortgage debt in execution by public auction carries with it the right to proceed against the mortgaged property. No attachment and sale under S. 274 of the old Civil Procedure Code was considered necessary in such a case. In this case it appears that the hypothecated mortgage decrees obtained by the Nadars were sold by the Kumbaconam Sub-Court at the instance of the Chetties and bought in with that court's permission, and afterwards there was an amicable settlement in this court at which the sale to the Chetties was confimed.

Order XXI, r. 55, Cls. (1), (3) and (9) of the new Code of Civil Procedure which govern the present proceedings make the matter much clearer than S. 273 of the old Code. Cl. (1)

1. 5 M.L.T. 278.

2. (1901) I.L.R. 26 Bom. 305.

Kuppusami Iyer v. Subbaraya Rowtha. — Spencer J.

expressly makes the rule applicable to decrees for sale in enforcement of a mortgage; cl. (3) declares that the holder of the second decree shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute the attached decree in any manner lawful for the holder thereof, and cl. (6) deals with the procedure to be followed as to giving of notice.

In *Ramasawmi Pillai* v. *Muthu Chetty* [1] a mortgagee was held to be a transferee for the purposes of S. 134 of the Transfer of Property Act and to have a right as such to sue in his own name. The appellants in the present case are in a stronger position as they are mortgage-decree-holders and have, by the compromise effected in this court, become purchasers of the decrees obtained against the respondents. The whole interest of the Nadars in the decrees obtained by them has passed to the Chetties by operation of law and therefore the appellants were entitled to apply as transferees under O. XXI, r. 16, for execution of those decrees to the court which passed them. These appeals must for these reasons be allowed with costs in this court and the court below and the execution petition must be sent back to the Subordinate Judge for disposal according to law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr Justice Abdur Rahim and Mr. Justice Spencer.

Subbaraya Iyer and others	..	Appellants*
v.		(*Petitioners*)
Ramasawmy Pillai	..	Respondent.

Subbaraya Iyer v. Ramasawmi Pillai.

C.P.C., S. 47, O. XX, r. 11—Old Code, S. 257-A—Agreement between decree-holder and judgment-debtor—Enforceability in execution.

An agreement between a money decree-holder and the judgment-debtor by which the former is benefited can be enforced in execution.

The *ratio decidendi* of the decisions in *Venkatagiri Aiyar* v. *Sadagopachariar*[2] and *Palaniyappa Chettiar* v. *Savari Nayadu*[3] to the contrary has lost its force by reason of S. 47 and O. XX, r. 11, of the new Code. *Sheo Golam Lall* v. *Beni Prasad*[4], *Durga Prasad Banerjee* v. *Lalit Mohun Singh Roy*[5], and *Thakoor Dyal Singh* v. *Sarju Pershad Misser*[6] followed.

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*A. A. O. No. 1 of 1910. 29th November 1911.

1. (1910) M. W. N. 4.
2. (1900) 14 M. L. J. 359.
3. (1908) 18 M. L. J. 548.
4. (1879) I. L. R. 5 C. 27.
5. (1897) I. L. R. 25 C. 86.
6. (1892) I. L. R. 20 C. 22.

Subbaraya Aiyar *v.* Ramasawmi Pillai.

Appeal from the order of the District Court of Trichinopoly in E. P. No. 51 of 1909 in O.S. No 28 of 1903.

T. Natesa Aiyar for appellants.

N. Rajagopalachariar for respondent.

The Court delivered the following

JUDGMENT:—In the course of executing the decree in O. S. No. 28 of 1903 on the file of the District Court of Trichinopoly obtained upon a deed of hypothecation the parties entered into an agreement whereby the second defendant was given time to satisfy the decree on condition of his paying interest at 12 per cent. per annum instead of 9 per cent. per annum and the decree was made executable against the person of the second defendant as well as by sale of the hypotheca. The court sanctioned the arrangement under S. 257-A of the Code of Civil Procedure on 26th July 1905. On August 2nd, 1909, the plaintiff's legal representatives sought to execute the decree for the unpaid balance by arresting the second defendant. The District Judge dismissed the application relying on the ruling in *Venkatagiri Iyer* v. *Sadagopachariar*[1]. It was held in that decision that the court's sanction of an agreement between the decree-holder and the judgment-debtor by which the former is benefited does not make it a part of the decree, but the decree-holder must bring a separate suit to enforce it. *Bhashyam Iyengar* J. pointed out that a court has no power to vary or add to its decrees after they are passed except under particular provisions of law, and he quoted in support of his view the opinion of the Privy Council in *Kothagiri Venkatasubbana Row* v. *Vellanki Venkatrama Row* [2] that subsequent variations of decrees unless made under S. 206 or S. 623, Civil Procedure Code, were *ultra vires.* Their Lordships of the Privy Council observed at the same time that it was open to the court to treat such a compromise as a rule of court and to stay all further proceedings in the decree against the 3rd defendant who alone compromised in that case with the plaintiffs except for the purposes of enforcing the compromise.

1. (1900) 14 M.L.J. 359. 2. (1899) I.L.R. 24 M. I.

Subbaraya Iyer v. Ramasawmi Pillai.

Now in the present instance the compromise was sanctioned by the court at a time when the Code of 1882 was in force and compromises of this nature after suit were declared by S. 257-A to be void unless made for consideration and with the sanction of the court.

When execution against the person of the 2nd defendant was applied for in 1909 the Code of Civil Procedure of 1908 was in force and the old S. 257-A had dropped out. Further the old S. 210 had reappeared as O. xx, r. 11, in a new form containing a provision for a court after the passing of a decree where and in so far as it is a decree for the payment of money ordering the postponement of payment of the amount decreed on such terms as to the payment of interest as it thinks fit. Lastly S. 47 of the new Code of Civil Procedure corresponding to S. 244 of the old Code had an additional clause added to it, which permits courts, subject to objections that may be raised on account of limitation or jurisdiction, to treat proceedings under this section relating to the execution, discharge or satisfaction of a decree as a suit or a suit as a proceeding.

With this alteration of the law the *ratio decidendi* of the decisions in *Venkatagari Iyer* v. *Sadagopachariar*[1] and *Palaniyappa Chettiyar* v. *Savari Nayadu*[2] has lost its force.

We find no difficulty in following the decisions in *Sheo Golam Lall* v. *Beni Prasad*[3], *Durga Prasad Banerjee* v. *Lalit Mohun Singh Roy*[4] and *Thakoor Dyal Singh* v. *Sarju Pershad Misser*[5], and we think accordingly that the 2nd defendant, who had the benefit of the arrangement for delay in execution and the order passed sanctioning it, is not at liberty to resile from that arrangement.

The lower court's order is reversed, and the case will be sent back to the District Judge for proceeding with the execution application.

The respondent will bear the appellants' costs in both courts.

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1. (1600) 14 M.L.J. 359.
2. (1908) 18 M.L.J. 548.
3. (1879) I.L.R. 5 C. 27.
4. (1897) I.L.R. 25 C. 86.
5. (1892) I.L.R. 20 C. 22.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Abdur Rahim.

Adisupalli Venkata Row, Executor to the estate of the deceased Ramanujammal.. Appellant*

v.

Marikuruthu Ammal and another .. Respondents

Limitation Act, Art. 182—Application against one of several representatives of deceased judgment-debtor—Effect on other representatives.

Ramanuja Ammal v. Marikuruthu Ammal.

An application for execution against one of the representatives of a sole judgment-debtor saves limitation against other representatives as well. [*Ramanuj Seivak Singh* v. *Hurgu Lal* [1] and *Krishnajee Janardhan* v. *Murar Row Narasinga Row* [2] followed.]

Appeal from the order of the District Court of Chingleput in A. S. No. 224 of 1909 presented against the order of the Court of District Munsif of Poonamalle in C. M. P. No. 884 of 1906 in E. P. No. 774 of 1906. (O. S. No. 161 of 1894 on the file of the City Civil Court of Madras.)

Joseph Satya Nadar for appellant:—If one legal representative is brought within the period of limitation it is enough to save limitation and the fact that other legal representatives are brought in out of time is immaterial—*Ramanuj Seivak Singh* v. *Hurgu Lal*[1] *Krishnajee Janardhan* v. *Murar Row* v. *Narasinga Row*[2].

Respondent was not represented.

The Court delivered the following

JUDGMENT:—The judgment-creditor had applied in time for bringing one of the representatives of David Pillai, namely the 2nd respondent Sawmi Pillai, on record and that application was granted. That being so the cases of *Ramanuj Seivak Singh* v. *Hurgu Lal*[1] and *Krishnajee Janardhan* v. *Murar Row Narasinga Row*,[2] with which we agree, show that there is no bar to the other representatives of David Pillai, viz., respondents 3 and 4, being also brought on the record, on the present application. We may say that we do not understand the ground on which the learned District Judge distinguishes these cases. We order that Marikuruthu Ammal and Kalaniathi Ammal be brought on the record as legal representatives of David Pillai, and set aside the order of the District Judge with costs to be paid by the respondents.

* A. A. A. O. No. 23 of 1909. 28th November 1911.

1. (1881) I.L.R. 3 A. 517.

2. (1887) I.L.R. 12 B. 400

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Ponnuswamy Nadar and others .. Appellants*
(*Defendants Nos.* 1, 2 *and* 4 *to* 12, *Judgment-debtors*)

v.

Letchmanan Chettiar, Minor, through mother and next friend Menatchi Achi and others .. Respondents
(*Petr. Assignee-Decree-holder, Plaintiffs Nos.* 1 *to* 2, *Original decree-holders and Supplemental Respondents*).

Ponnuswamy Nadar *v.* Letchmanan Chettiar.

C. P. C., O. XXI, *r.* 2—"*Adjustment*"—*Applicability of rule—Objection that assignee of decree is not real assignee—Adjustment before assignment not certified—Maintainability of objection.*

Objection was taken by the Judgment debtor to execution of a decree by its assignee on two grounds—(1) that the assignee was not the real transferee but was only a benamidar for the judgment-debtor on the understanding between the judgment-debtor and the assignee that the former will execute a mortgage to the latter for the amount; (2) that the decree had been satisfied before the assignment by the assignee agreeing to advance a certain sum and to that extent the decree could not be executed in any event, even though the adjustment was not certified.

Held: Per *Abdur Rahim* J.:—That the arrangement between the assignee and the judgment-debtor was an adjustment within the meaning of O. xxi, r. 2, and that the bar created by the rule applied to the arrangement pleaded, even though the same took place prior to the assignment. [*Dictum* in *Rama Ayyan* v. *Srinivasa Pattar*[1] dissented from.]

Per *Sundara Aiyar* J.:—That the assignment consequent on the arrangement suggested need not necessarily amount to an adjustment within the meaning of the rule; that it was always a question of the intention of the parties which could be decided only on evidence, and that clause 3 of O. xxi, r. 2, did not prevent the judgment-debtor from proving that the assignment was not intended really for the benefit of the assignee merely because the fact showing that it was not for his benefit would also show that the assignor's decree was adjusted by means of the agreement between the judgment-debtor and the assignee.

S. 258 of the old Code or O. xxi, r. 2, has no application to an adjustment made with a third party, and the fact that the third party afterwards became the assignor of the decree cannot alter the position. [*Rama Ayyan* v. *Srinivasa Pattar*[1] followed.]

An assignment which operates as a satisfaction of the decree may be relied on to prove that the assignee obtained no valid title under his assignment. [*Sutton* v. *Sutton*[2]; and *Manmohan Karmokar* v. *Dwarka Nath Karmokar*[3] referred to.]

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* A. A. O. No. 239 of 1909. 21st September, 1911.

1. (1895) I. L. R. 19 M. 230.
2. 26 S. C. 33.
3. (1910) 12 C. L. J. 312.

Ponnuswamy Nadar *v.* Letchmanan Chettiar.

Rahim, J.

Per *Sundara Aiyar* J. (*dubitante*) :—Where the adjustment and the transfer deed were before the time within which a compulsory record of the adjustment expired and also before the new Code came into force, the old Code would apply even though the execution application was put in after the coming into force of the new Code.

Per *Abdur Rahim* J.:—*Obiter*:—The Code in force at the time of the application for execution would govern the matter.

Appeal from the order of the Court of the Subordinate Judge of Negapatam in E. P. R. No. 33 of 1909 in O. S. No. 18 of 1904.

S. Srinivasa Aiyangar and *K. V. Krishnaswami Aiyar* for appellants.

K. Srinivasa Aiyangar and *T. Rangaramanujachariar* for respondents.

The Court delivered the following

JUDGMENTS :—*Abdur Rahim* J.—This appeal raises a question of some nicety with reference to the construction of Order XXI, Rule 2, corresponding to S. 258 of the old Civil Procedure Code, 1882.

The 1st respondent applied for execution of a decree which he alleged had been assigned to his father by the original decree-holder. Objection is made to execution by the 2nd appellant, who is one of the judgment-debtors, on the ground that the assignment which is in the name of the 1st respondent's father was made under an arrangement by which the 1st respondent's father was to be a mere benamidar for the judgment-debtors. On the date of the assignment the amount due under the decree was Rs. 60,000, and the allegation of the judgment-debtors is that Rs. 15,000 out of this sum was actually paid to the original decree-holders, and that an assignment of the decree was obtained in the name of the 1st respondent's father on the understanding that he was to hold it for the appellants' benefit, the appellants agreeing to pay the balance of Rs. 45,000 due under the decree.

The Subordinate Judge has held, by way of demurrer, that accepting the facts as stated by the appellants he, as the court executing the decree, is precluded from giving effect to the arrangement inasmuch as admittedly it was not certified as required by O. XXI, r. 2. He regards the arrangement as an adjustment or satisfaction of the decree.

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Rahim, J.

It is now contended by the learned Vakil who appeared for the appellants that here there are two questions. The first is whether the assignee has a good title. The next question, which would only arise if the first question is answered in the affirmative, is whether there has been any adjustment or satisfaction within the meaning of the law. It seems to me that on the allegations of the appellants themselves it is impossible to accept this contention as sound. The first respondent is *prima facie* an assignee of the decree, and he applies to the court to give effect to his assignment by executing the decree. The judgment-debtors' objection is that the assignment was intended for their own benefit and that the first respondent was a mere benamidar.

The question, therefore, which this court has to decide is whether any effect can be given to this objection of the appellants. Suppose the judgment-debtors had obtained the assignment in their own name from the decree-holders, it could hardly be contended that such assignment would not amount to an adjustment or satisfaction of the decree. And I did not understand Mr. S. Srinivasa Iyengar to contend that it would not. If such assignment was not certified as required by O. XXI, r. 2, it seems to me clear that the judgment-debtors could not rely upon the assignment as a bar to execution. Should the assignment be any the less an adjustment or satisfaction of the decree because it was obtained in the name of another person as a mere benamidar or *alias* the judgment-debtors themselves? Speaking for myself, I am unable to see any reason why it should be. The language of r. 2, paragraph 3, is "a payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognised by any court executing the decree." If the arrangement alleged amounts to an adjustment—and there can be no doubt that it does—the language of the section is imperative that the court executing the decree shall not recognise it at all. But it is contended that the adjustment referred to in the Code is what purports to be an adjustment and not what has the effect of adjustment by the operation of law. There is no reason why the meaning of the word 'adjustment' should be limited in that way when there is nothing in the section itself to suggest such a limitation. It is not the name by which a party calls a transaction but its legal character with which the court is concerned. The very object of the arrangement relied on

by the appellant was that the decree should be assigned to him, only that it should stand in the name of another person as a sort of *alias* for him. It is not the case of the appellants, and their learned pleader does not seek to make out any such case before us, that the object of the arrangement was that the decree should be capable of execution by the assignee under certain circumstances, and that it should not be capable of execution under other circumstances and that the decree cannot be executed because such latter circumstances have happened. The appellants' case is that by the arrangement in question the title to the decree passed to them and not to the first respondent.

It was also argued on the strength of the words "shall not be recognised as a payment or adjustment of the decree," which occurred in S. 258 of the old Code, that the adjustment in this case may be given effect to as showing want of title in the plaintiffs. The words "as a payment or adjustment of the decree" have been omitted from the new Code, and it is the new code that governs the application for execution in this case, which was made on the 2nd February 1909. It is, therefore, not necessary to decide whether the words "as a payment or adjustment of the decree" could in any way help the appellants. But I may say that, having regard to the nature of the transaction alleged in the case, I do not see how, if it cannot be pleaded as an adjustment, it can be relied on as showing want of title in the plaintiffs. The language of the legislature is that an adjustment which is not certified shall not be recognised by the court executing the decree and I find no reason for limiting the prohibition to cases where the decree is sought to be executed by the decree-holder himself. Reliance has been placed on the decision of Sir *S. Subrahmanya Aiyar* J. in *Rama Ayyan* v. *Srinivasa Pattar.*[1] The judgment in that case is really based on the finding of fraud committed by the transferee of the decree against the judgment-debtor. But the learned Judge goes on to observe, with reference to certain suggestions that occurred to him as regards the scope of S. 258 of the Code of 1882, it is only when the parties to the transaction adjusting a decree stood at the date of such transaction in the relation of judgment-creditor and judgment-debtor that the provisions of S. 258 would

1. (1895) I. L. R. 19 M. 230.

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apply. In other words, they would not apply if the transferee of the decree seeks to execute it and the adjustment sought to be pleaded is one which was entered into before the date of the transfer. With all respect to the learned Judge, I am unable to accept this *dictum* as a correct exposition of S. 258. 'Decree-holder' includes the transferee of the decree by virtue of S. 2 and there is certainly nothing in S. 258 itself which would support the conclusion of the learned Judge. Reference has also been made to a *dictum* of *Turner* C.J. in *Agra Bank* v. *Cripps* [1]. But the general observation of the learned *Chief Justice* that, if the bank, which in that case obtained an assignment of the decree against one Pinsent, was merely a benami holder, the decree could not be executed, is made without any reference to S. 258 of the Civil Procedure Code. There is a similar *dictum* in *Monmohan Karmokar* v. *Dwarka Nath Karmokar* [2]. There would be force in such observations where the assignee of a decree is a benamidar for a person other than the judgment-debtor, for in such a case no question under O. XXI, r. 2, would arise.

I would confirm the judgment of the Subordinate Judge and dismiss the appeal with costs.

Sundara Aiyar J.—This appeal is against an order of the Subordinate Court of Negapatam disallowing certain objections raised by the judgment-debtors in O. S. No. 18 of 1904 to an application for execution made by the transferee of the decree-holders' rights. The decree was one passed for sale on a hypothecation bond. The applicant's father, Ramanathan Chettiar, obtained a transfer deed from the original decree-holders on the 11th of April 1908. The objections raised were:—(1) that the real transferees under the deed of assignment relied on by the petitioner were the judgment-debtors themselves, and that the applicant was not therefore entitled to execute the decree; (2) that out of Rs. 60,000, the total amount due under the decree on the 10th of April 1908 as per settlement of accounts between the original decree-holders and the judgment-debtors, the latter paid Rs. 15,000 to the former, and the applicant was not therefore entitled to execution, at any rate for the amount so paid; and (3) that the execution application was bad for non-joinder of

1. (1885) I.L.R. 8 M. 455 at 463. 2. (1910) 12 C.L.J. 312.

certain other persons who, according to the judgment-debtors, were jointly entitled with the applicant in case the latter should be the real transferee of the decree. The Subordinate Judge overruled these contentions. The argument at the hearing of the appeal was confined to the first contention. It was decided by the Subordinate Judge on demurrer without taking evidence. It is therefore necessary to set out the defendants' case on the point precisely. The 2nd defendant alleged that after payment of Rs. 15,000 out of the Rs. 60,000 due to the original decree-holders Rs. 45,000 remained to be paid and that the applicant's father, Ramanathan Chetti, agreed to advance that amount as a loan for the judgment-debtors. He then goes on to say: "The said assignment deed was got up in the name of the said Ramanathan Chettiar (that is, the applicant's father) *benami* for the benefit of myself and others (the others being his co-judgment-debtors.) The said Ramanathan Chettiar conducted no proceedings whatever on the said assignment-deed during his life time. In these circumstances, the petition presented by the petitioner is unsustainable according to law.

" And there was an arrangement to the effect that for the amount of Rs. 45,000 undertaken to be paid by the said Ramanathan Chettiar as, above mentioned, and for a further sum of Rs. 5,000 required by me and others, in all for Rs. 50,000, I and the others should execute a mortgage by conditional sale or a usufructuary mortgage-deed in the name of the said Ramanathan Chettiar in respect of the properties mentioned in the decree in question, that the same should be got back after paying the said amount in 5 years' time, and that the said Ramanathan Chettiyar should get executed the documents in respect of the same within some time at his convenience."

The agreement between Ramanathan Chettiar and the judgment-debtors was admitted before the Subordinate Judge to have taken place before the 10th April 1908. The deed of assignment of the decree was executed subsequently on the 11th of April. The Subordinate Judge was of opinion that, on the construction of the judgment-debtors' plea set out above, Ramanathan Chettiar was not a mere benamidar for the judgment-debtors. He says: "The assignment of the decree might have been intended to be a sort of help to the defendants, but it can in no sense be regarded as

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obtained for their benefit. It was admittedly not obtained with the funds of the defendants. Defendants had entered into an agreement with the assignee for effecting a sale or mortgage in satisfaction of the decree." This finding of the Subordinate Judge cannot be supported. The fact that the amount due to the original decree-holders was paid by the assignee may be good reason for holding that he was not a mere benamidar, but this is not a necessary inference from the fact of his paying the consideration which passed to those transferors. The question, for whose benefit the decree was in fact transferred, is one of the intention of the parties. The judgment-debtors' case is that it was intended for their benefit and that the sum of Rs. 45,000 which the assignee paid to the transferors was advanced merely as a loan for the judgment-debtors' benefit. Such an arrangement is not impossible. It is not impossible that the applicant's name was entered as the nominal transferee on account of his advancing the mortgage amount as a loan for the judgment-debtors, and that it was intended that the right to the decree should at once vest in the judgment-debtors and not in the transferee. The applicant's plea that a mortgage-deed was to be executed by him as security for the loan would, if true, probablise his contention. The Subordinate Judge was wrong in holding that in the circumstances the right to the decree must necessarily vest in the applicant. He was bound to decide the question after taking the evidence which the parties wished to adduce. But the respondents' Vakil, Mr. K. Srinivasa Iyengar, contends that the plea that the appellants were themselves the real transferees of the decree cannot be given effect to, as the plea really amounts to this, that the decree debt due to the original decree-holders was discharged by an adjustment made by means of the stipulations with the 1st respondent's father referred to above, and that, as the adjustment was never certified to the Court, S. 258 of the Civil Procedure Code (Act XIV of 1882) would operate as a bar to the plea. Mr. S. Srinivasa Iyengar, the learned Vakil for appellants urges, in reply, firstly, that S. 258 has no application to a contention that the 1st respondent obtained no title under the transfer relied on by him and that he is not therefore the decree-holder and is not entitled to apply for execution, the section being applicable only where it is contended that the decree is not any further executable at all

without any question as to whether the applicant is the decree-holder or not, and secondly, that the section applies only where the contract of adjustment is made with the decree-holder and not with a third person and that in this case the adjustment was made with the 1st respondent's father, Ramanathan Chettiar, before the transfer to him. I am of opinion that the respondent's contention is not entitled to succeed. I am not sure that the case has not to be decided under the provisions of Act XIV of 1882 as the adjustment and the transfer-deed were in April 1908 and the time within which the judgment-debtors could have obtained a compulsory record of the adjustment also elapsed in 1908, before the new Civil Procedure Code (Act V of 1908) came into operation. There is, however, in my opinion, no material difference between the last clause of S. 258 of Act XIV of 1882 and the same clause in O. XXI, r. 2, of Act V of 1908. In the former Act the clause ran as follows:—'Unless such a payment or adjustment has been certified as aforesaid it shall not be recognized as a payment or adjustment of the decree by any court executing the decree." In Act V of 1908 the clause runs in these terms: "A payment or adjustment which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree." It will be noticed that in the later Act the words "as a payment or adjustment of the decree" have been omitted. But I am of opinion that the meaning of both clauses is the same, the word 'recognized' itself implying 'as an adjustment'. Now the question to be decided is whether the clause prevents the appellants from proving that the assignment was not intended for the benefit of the 1st respondent, because the fact showing that it was not for his benefit would also show that the original decree-holders' decree was adjusted by means of the agreement between the appellants and the 1st respondent. In my opinion, the clause does not prevent it. The object of the clause, as I understand it, is to provide that everything preventing the execution of the decree should be made a record of the court so as to give the court complete control over its decree and the execution thereof. It is not a part of its object to restrain the transfer of decrees by the decree-holder to any one he chooses. It does not make payments or adjustments which are not recorded or certified to the court invalid, and the court will give effect

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to such adjustments in proceedings other than the execution of the decree. Neither is the clause a rule of evidence, forbidding the proof of uncertified adjustments. It merely forbids effect being given to such adjustments when they are set up as a defence to the execution of the decree by one entitled to do so. As put by Mr. S. Srinivasa Iyengar, the question of adjustment comes in only after a person who claims to execute the decree as a transferee has proved his right under the transfer. It is only then that the question arises whether the decree of which he has obtained a transfer is a subsisting one capable of execution. When the applicant's right as transferee is denied by the judgment-debtor he has to bear the onus of proving it. Assuming that the fact that he has a deed of transfer purporting to be in his favour would be *prima facie* proof of his right and that the judgment-debtor would then have to rebut the presumption, I can see nothing in the section to disentitle him to prove any facts which would show that the applicant is not the transferee but some one else, and this would be equally so even if the facts he relies on must necessarily show that the decree has been adjusted, for he does not adduce them to prove that there is no subsisting decree, but to disprove the allegation that the applicant is the transferee. A provision of law like the one in question should not be stretched beyond its express words and beyond the object which the words were intended to serve. As a matter of fact, however, I do not think that in strictness it is necessary for the appellant, for rebutting the plaintiff's case, to go further than to allege that the plaintiff is not the real transferee. If he goes further to say that he is himself the real transferee, it is only to induce the court to believe his assertion that the transferee is not the applicant.

The appellants' second argument also has, in my opinion, much force. As already observed, the adjustment in this case, except with regard to the payment of Rs. 15,000, was made with the 1st respondent's father and before the 10th of April 1908 and also before he obtained the transfer-deed on the 11th April. He was not then the decree-holder. Section 258 has no application to an adjustment made with a third party. The judgment-debtors could not compel such a person to certify the adjustment to the court. This was the view held by *Subrahmanya Aiyar* J. in

Pennuswamy Nadar v. Letchmanan Chettiar.

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Ramayyan v. *Srinivasa Pattar*[1] the facts of which case were similar to those in the present one. The circumstance that the 1st respondent afterwards obtained a transfer of the decree cannot alter the position and would not, I believe, entitle the appellants to compel the 1st respondent to certify an adjustment which the former did not enter into with the latter as a decree-holder. As put by *Subrahmanya Aiyar* J. the transfer "can have no retrospective effect so as to deprive the judgment-debtor of his right to establish that the transferee is by the anterior contract precluded from releasing the judgment-debtor." It may perhaps be contended that the anterior contract is no reason for depriving the assignee of his rights under his transfer, that he is entitled to all the rights of his transferor and therefore has the right to execute the decree which has not been satisfied on the record of the court. But to such an argument it may well be replied that, after entering into the contract, he should not be allowed to set up any right in opposition to that contract by virtue of an assignment, and, to my mind, the argument would apply *a fortiori* where the contract is that he should obtain a transfer for the benefit of the judgment-debtor himself.

The appellants relied on another case, *Agra Bank* v. *Cripps*[2]. In that case there is a *dictum* of *Turner* C. J. that if a decree has been adjusted a subsequent transferee could not be allowed to execute it although the discharge has not been certified to the court. It might be alleged in opposition to this *dictum* that in consequence of the adjustment not being certified, the transferor had still an executable right in the decree, and that the transferee was entitled to exercise that right. The answer to this argument no doubt would be that notwithstanding the non-certifying of the adjustment the discharge is valid in law and that the transferee would obtain nothing under the transfer. I do not feel, however, quite satisfied that this answer is conclusive, and I therefore hesitate to rest my judgment on this ground. The view propounded by *Turner* C. J. was, however, taken also by the Calcutta High Court in *Manmohan Karmokar* v. *Dwarka Nath Karmokar*[3]. In that case a mortgagor-judgment-debtor, against whom a decree for sale had been passed, obtained, in

1. (1895) I.L.R. 19 M. 230. 2. (1885) I.L.R. 8 M. 455.
3. (1910) 12 C. L. J. 312.

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order to defraud a subsequent purchaser of the equity of redemption, a transfer of the rights of the mortgagee-decree-holder whose debts he discharged in the name of a third person who sought to bring the property to sale in execution. The purchaser of the equity of redemption resisted the sale. *Mookerjee* J. delivering the judgment of the court observes (p. 321) : "In our opinion he is not entitled to proceed with execution under such circumstances, because as laid down in S. 233 of the Civil Procedure Code of 1882, now S. 49 of the Code of 1908, the transferee of the decree holds the same subject to the equities, if any, which the judgment-debtor might have enforced against the original decree-holder. In substance, the assignee stands in no better position than the assignor as regards equities existing between the original parties to the judgment, and takes it subject to all the equities and defences subsisting at the time of the assignment, which the judgment-debtor could have asserted against it in the hands of the judgment-creditor notwithstanding the assignee may have had no notice thereof. Hence, as well put in the case of *Sutton* v. *Sutton*. [1] "if the assignor has no title to the judgment, he can convey none to the assignee, and, where a judgment, once paid though not satisfied on record, is assigned by the judgment-creditor, the assignee takes it subject to all the defences and equities which were available to the judgment-debtor against the assignor—BLACK on *Judgments*, Vol. II, S. 953 ; FREEMAN on *Judgments*, Vol. II, S. 427." The further observations made by the learned Judge are applicable to the present case : "If again, it is proved that the decree has not been formally satisfied but that the assignee is a benamidar for the judgment-debtor, he ought not to be allowed to execute the decree as against the representative of the latter, because the assignment in substance operates merely as a satisfaction of the decree." In that case no doubt the assignee and the judgment-debtor acted in collusion against a third party, namely, the purchaser of the equity of redemption. But that fact, in my opinion, makes no difference with respect to the principle involved in the judgment, namely, that an assignment which operates as a satisfaction of the decree may be relied on to prove that the assignee obtained no valid title under his

1. 26 S. C. 33.

assignment. It will be noticed that in the Calcutta case the plea that the applicant for execution was not the real assignee was raised by one who claimed to be the representative of the judgment-debtor. In my view, the judgment-debtor is equally entitled to raise the same contention against the transferor in this case.

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On the whole my conclusion is that the Subordinate Judge's decision that S. 258 is a bar to the defendants' plea of no title in the 1st respondent is untenable. I would, therefore, reverse the order of the lower court and remand the application to the lower court for disposal according to law.

Under S. 98, Civil Procedure Code, 1908, the appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Muthia Chetti .. Appellant* (*Prisoner*)

v.

Emperor .. Respondent.

Penal Code, S. 471—" User"—" Using as genuine"—Production in obedience to summons—Statement that document is genuine.

Muthia Chetti *v.* Emperor.

The mere production of a document in answer to a command of court (*e.g.*, a summons) cannot amount to "user" of the document, nor be regarded as fraudulent in law.

The giving of false testimony with a fraudulent intention by itself cannot amount to a fraudulent user of a document with reference to which that evidence is given. A mere statement that a document is genuine does not amount to using it as genuine. [*Asimuddi* v. *The King-Emperor*[1] referred to.]

Appeal from the sentence of the Court of Sessions of the Madura Division in Sessions Case No. 39 of the Calendar for 1911.

The accused in this case was convicted of using a forged document when he produced it in obedience to a summons in a court.

R. Sadagopachariar for accused :—Production in a court in obedience to a summons is not 'user'. User must be voluntary. If it was not produced in obedience to the summons the accused would have been guilty under S. 175, I. P. C. Whatever a man

*Cr. A. No. 567 of 1911. 5th December, 1911.

1. (1907) 11 C. W. N. 838.

Muthia Chetti v. Emperor.

does in compliance with a direction of law does not come within the category of an offence—S. 76, I. P. C. User must be voluntary if it is to be criminal—9 Halsbury 234. This point is decided in Crl. M.P. 341 of 1911; see also *Asimuddi* v. *The King-Emperor*[1] and S. 162, Evidence Act.

C. F. Napier for the Crown :—The summons is to produce a document executed by a certain person which means a genuine document. For the purposes of this argument the production of a forged document is not a production of the document asked for. S. 76, I. P. C., will not cover such a case.

Neither S. 162, Evidence Act, nor S. 175, I.P.C., deals with 'user' but only 'production.' In this case the accused not only produces the document but also proves it. [*Sundara Aiyar* J.—Proving is not using. He is not charged with perjury. Supposing attesting witnesses are examined. Will their proving it amount to user by them ?] To see whether he has used it we may look at his evidence and whether he relied upon it. (The accused's evidence in the civil case read.) [*Spencer* J.—'Using' means using for the purpose of the case; not producing in obedience to a summons].

The Court delivered the following

JUDGMENT:— In this case the accused has been convicted under S. 471 of the Indian Penal Code of fradulently or dishonestly using as genuine a document which he knew or had reason to believe to be a forged document.

The facts are that the accused was summoned to produce the document in question (Exhibit J.) in O. S. No. 39 of 1910 on the file of the Subordinate Judge's Court of Madura West. He was not a party to that suit. In answer to the court summons he produced the document. He was afterwards examined as witness in that case, and he gave the deposition marked as Exhibit K. He then stated on oath that the prosecution first witness in that case gave the document to him. The learned Sessions Judge has found that the document was not genuine and that the prosecution first witness did not give it to the accused We decide the case on the assumption that these findings are correct. So far as the production of the document was

1. (1907) 11 C. W. N. 838, 840.

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concerned, the accused was bound to obey the summons of the court. S. 162 of the Indian Evidence Act lays down that every witness summoned to produce a document shall do so, and S. 175 of the Indian Penal Code makes the non-production of it an offence punishable under that section. We adhere to the opinion we expressed in Crl. M. P. No. 341 of 1911 that the production by a party of a document which he is bound by law to produce cannot by itself constitute a user of that document by him. He cannot be put to the risk of having to consider whether a document answering the description contained in the summons is in fact genuine, and whether there is any reason to believe it to be not genuine. The mere production of a document in answer to a command of court can in no case be regarded as fraudulent in law. The learned Public Prosecutor argues that the accused did more than produce the document in this case because he swore when he was examined as a witness that the document was handed to him by the prosecution first witness, and he urges assuming, as we are prepared to do for the purpose of deciding the question of law, that the accused had the dishonest intention, when he gave his evidence, of inducing the court to give judgment in favour of the plaintiff in that suit, his giving evidence would make the act a dishonest user of the document by him. We must put entirely out of account the fact that he produced the document, as that act was perfectly innocent. All that is then left is that he gave false evidence with the fraudulent intention of causing loss to one of the parties in the suit. We are clearly of opinion that the giving of false testimony by itself with a fraudulent intention cannot amount to a fraudulent user of a document with reference to which that evidence is given. Otherwise every attesting witness who gives evidence with a similar dishonest intention might also be held guilty of dishonestly using the document. It is not contended that there is any evidence in this case of user beyond the fact that he gave evidence. There is no evidence of any previous conspiracy in pursuance of which he gave the evidence We must, therefore, hold that the accused did not commit an offence under S. 471 of the I.P.C. If the evidence he gave was false he would, of course, be guilty of perjury. But he is not charged with that offence in this case.

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In *Asimuddin Sheik* v. *King-Emperor* [1], *Rampini* and *Gupta*, JJ. held that a party who had produced a document before a Munsif for obtaining compulsory registration of it could not be held guilty of an offence under S. 471, I. P. C., by merely declaring it to be genuine before a Deputy Magistrate to whom the document was sent over by the Munsif for an inquiry being held as to whether he was guilty of forging the document.

The statement before the Deputy Magistrate was not made by the accused on oath and he could not therefore be convicted of perjury. It was sought to be argued that he was guilty of using the document as genuine by declaring it to be true. The learned Judges say: "He may have used the document before the Munsif when he brought a suit to enforce registration but he is not charged in this case with using the document before the Munsif. He is charged with using it before the Deputy Magistrate and we do not think he can be said to have committed any offence on the 21st January 1902 punishable under S. 471, I.P.C."

There is, of course, a difference between that case and this in that the statement made by the accused as a witness in this case was made on oath, while in the Calcutta case the statement was made by him before the Deputy Magistrate as an accused person and not on oath. But that does not affect the general proposition that a mere statement that a document is genuine does not amount to using it as genuine. We therefore set aside the conviction of the accused. We do not consider it necessary to pass any further order having regard to the state of the evidence on record. The bail bonds executed by the accused will be discharged.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Ayling.

Subbiah Servai and others .. Accused* in *Calendar Case No.* 744 *of* 1911 *on the file of the Stationary Sub-Magistrate of Palani.*

Subbiah Servai *In re.*

Penal Code, S.* 378—"*Moveable property*"—*Fish in irrigation tank when water is at low level.*

Semble :—The removal of fish from a Government irrigation tank, in which the water is at such a low level that the fish cannot escape, is theft.

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1. (1907) II C. W. N. 838.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code by the Additional District Magistrate of Madura in his letter dated the 16th September 1911, R. O. C. No. 744/ Mag. of 1911. Subbian Servai *In re.*

The Public Prosecutor (*C. F. Napier*) for the Crown.

The Court made the following

ORDER :—The accused were convicted of theft in removing fish from a Government irrigation tank. They pleaded guilty, but the District Magistrate, relying on the ruling in the High Court Proceedings 663, dated 10th April 1880, has referred the case on the ground that the capture of fish in an ordinary irrigation tank does not amount to theft.

The ruling quoted which has been followed in a later case—*Subba Reddi* v. *Munshoor Ali Sahib*[1]—is authority for the general principle above referred to, but there is a reason to doubt whether that principle is to be applied to all cases and under all circumstances or was intended to be so applied. A somewhat different view has been taken by both the Bombay and Calcutta High Courts, vide *Queen-Empress* v. *Shaik Adam Valed Shaik Farid* [2] and *Mayaram Surma* v. *Nichala Kantani* [3]. In the former case the tank in question was an enclosed municipal tank; but the *ratio decidendi* was that the fish being unable to escape from the tank are practically in the power and dominion of the owner so as to be capable of being the subject of theft. It has been pointed out that even in an open irrigation tank, after the water has fallen to such an extent that both the supply and distribution channels are dry, the freedom of the fish is equally circumscribed, and the learned Judges of the Calcutta High Court, in the ruling above quoted, appear to clearly recognise that under such circumstances a conviction for theft might be sustainable. It was presumably in view of those considerations that *Miller* J. in the latest Madras case to which I have been referred (Cr. R.P. No. 580 of 1909) held that each case must be decided on the particular facts thereof--in other words that the general principle laid down *Subba Reddi* v. *Munshoor Ali Sahib* [1] and the earlier case was not universally applicable. He accordingly refused to interfere with a conviction based on very similar facts to those in the present case.

1. (1900) I.L.R. 24 M. 81. 2. (1886) I.L.R. 10 B. 193.
3. (1888) I.L.R. 15 C. 402.

Subbiah Servai *In re.*

In this view I cannot but concur though I fully realise the desriability of a more positive exposition of the law, if it were possible, and the drawbacks inevitably attendant on a state of affairs in which an act which is lawful to-day may become a criminal offence to-morrow and *vice versa.*

In the present case the judgment gives no indication of the state of the tank, but the District Magistrate says that the Sub-Magistrate's statement that the water was so low that the fish could not escape is probably correct. In view of this and of the fact that the accused pleaded guilty and have only been awarded small fines, I do not feel it necessary to call for further evidence or to interfere in any way with the conviction and sentence.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Ayling.

IN CR. AP. No 514 OF 1911.

Arunachella Thevan .. Appellant (*Prisoner*)

IN CR. AP. No. 557 OF 1911.

Arunachella Thevan and another .. Appellants (*Prisoners*).

v.

Empeior .. Respondent.

Penal Code, Ss. 394, 397—*Robbery with grievous hurt caused by one of the body.*

Arunachella Thevan *v.* Emperor.

S. 394 and not S. 397, I. P. C., will apply to the case of a robber who does not himself cause grievous hurt or use any deadly weapon.

Appeal from the conviction an l sentence of the Court of Session of the Tinnevelly Division in Case No. 61 of the Calender for 1911.

M. D. Deva Doss for appellant.

The Public Prosecutor (*C. F. Napier*) for the Crown.

The Court delivered the following

JUDGMENT:—The appellants have been convicted by a jury of offences under Ss. 392 and 397, Indian Penal Code and sentenced each to 5 years' rigorous imprisonment. This sentence, as the learned Sessions Judge himself subsequently discovered and has pointed out in a letter of reference, is less than the minimum prescribed by S. 397, I. P. C.

I do not find any misdirection in the charge to the jury except as regards the liability of the appellants to conviction under S. 397, I. P. C. The Judge, while pointing out to the jury that there is no evidence that these appellants caused the

*Cr. A. Nos. 514 and 557 of 1911. 15th December 1911.

Arunachella Thevan v Emperor.

grievous hurt or (apparently) used deadly weapons, has directed the jury that they may convict the appellant of an offence under S. 397, I. P. C., merely because grievous hurt was caused by some of the robbers and (apparently) that some of the robbers used knives. This view finds no support in the wording of the section, especially as compared with S. 394, I.P.C., and is opposed to the ruling of this court in Cr. Ap. No. 315 of 1886 reported at page 450 of Vol. 1 of Weir's Law of Offences and Criminal Procedure and of the Allahabad High Court in *Emperor* v. *Nageshwar*[1]. It is not supported by the Public Prosecutor, I hold it to be erroneous. It follows that the conviction under S. 397, I.P.C., was wrong and was induced by a misdirection of the Judge. It must, therefore, be set aside.

But I see no reason to interfere with the conviction under S. 392, I. P. C. This is fully supported by the evidence and it is impossible to see how the verdict of the jury as regards this offence could have been influenced by the misdirection above referred to. I quash the conviction under S. 397, I. P. C., and uphold the conviction under S. 392, I. P. C. The sentence is reduced to three years' rigorous imprisonment in the case of each appellant.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Srinivasa Aiyar .. Petitioner*
(*Def. & in S. C. S. No.* 12151 *of* 1911 *on the file of the Presy. Sm. C. Court, Madras*)

v.

Balakrishna Devai .. Respondent
(*Plaintiff*).

Srinivasa Aiyar v. Balakrishna Devai.

Letters Patent, Cl. 13—*Transfer of suit from Presidency Small Cause Court—Practice—Procedure—Jurisdiction, original or appellate—Appellate Bench, incompetent.*

The High Court is competent to deal with transfer application of a suit from the file of the Presidency Small Cause Court, under its extraordinary original jurisdiction under Cl. 13 of the Letters Patent; and the application cannot be disposed of by a Division Bench sitting on the appellate side.

The jurisdiction of the High Court is broadly divided into three classes mutually exclusive of each other : ordinary original, extraordinary original and appellate.

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* C. M. P. No. 2056 of 1911. 15th December 1911.

1. (1906) I.L.R. 28 A. 404.

Srinivasa Aiyar v. Balakrishna Devai.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to order the transfer of Small Cause Suit No. 12151 of 1911 from the file of the Presidency Court of Small Causes, Madras, to the file of the High Court.

M. Subrahmania Aiyar for petitioner.

T. Ethiraja Mudaliar for respondent.

The Court made the following

ORDER :—This is an application for the transfer of a suit from the Presidency Court of Small Causes to this court and the application has come on before us, as a Bench sitting on the appellate side of the court

A preliminary objection was taken by the counter-petitioner that we have no jurisdiction to hear it, as the application should be made to a judge sitting on the original side. We are of opinion that this objection must be upheld.

S. 13 of the Letters Patent gives power to the High Court as a Court of Extraordinary Original Civil Jurisdiction to withdraw a suit pending in any other court and to try and dispose of it itself. According to that section the power of transfer is to be exercised by the High Court as a court of extraordinary original jurisdiction. It is contended that this does not show that this court has not also got the power to direct a transfer in the exercise of its appellate jurisdiction. Reliance is placed in support of this contention on S. 24 of the Code of Civil Procedure and on Appellate Side Rules of Practice, Rule No. 2, Cl. (4). So far as the former provision of law is concerned, it merely gives power to the High Court to withdraw a suit pending in any court subordinate to it and to try and dispose of the same, and has nothing to do with the question whether the High Court should exercise the power as a court of original or appellate jurisdiction. It does not, therefore, help the petitioner's contention in any way.

With regard to r. 2, cl. 4 (*d*), of the Appellate Side rules, that provision is equally useless to the petitioner. The object of that rule is only to lay down by how many judges of the court the matter referred to therein is to be disposed of. The rule applies only to the appellate jurisdiction of the court and is of no use in deciding whether an order of transfer in any particular class of

cases falls within its appellate jurisdiction or not. That question must be decided apart from the rule. It has nothing to do with the question whether the court has the power in the exercise of its appellate jurisdiction to make a transfer from the Small Cause Court to the High Court.

The question then is—Is the order of transfer in this case one to be made in the exercise of Original or Appellate jurisdiction of the court. Whetever may be the view to be held, in the absence of clear legislative provision on the subject, it appears to us that under S. 13 of the Letters Patent we are bound to hold that such an order should be made by the court as a court of extraordinary original jurisdiction. The terms 'original' and 'appellate' jurisdiction are used in contradistinction to each other, and it would be extremely inconvenient, if not absolutely illegal, to hold that the same function can come within the purview of both original and appellate jurisdiction. The jurisdiction is broadly divided into three classes mutually exclusive of each other, viz., ordinary original, extraordinary original, and appellate jurisdiction. Our view is in accordance with the order of the *Chief Justice* in C. S. No. 264 of 1911, although the point was not expressly dicided there, the application having been made under S. 13 of the Letters Patent. The same view was held in *Thomas Robert Doucett* v. *Josiah Patrick Wise*[1] where also the application appears to have been made under S. 13 of the Letters Patent.

Our attention has been drawn to a case in *Kadambini Baiji* v. *Madan Mohan Basack*[2]. That case merely decided that an order of transfer from the Presidency Court of Small Causes to a mofussil court of original jurisdiction could be properly made in the exercise of the High Court's appellate jurisdiction. That is a case to which S. 13 of the Letters Patent would not be applicable. There is no doubt that the Presidency Court of Small Causes is subject to the superintendence of the High Court. That is expressly declared by S. 6 of the Presidency Small Cause Court Act. But that fact does not decide in what manner the High Court is to exercise any of the powers which it has with respect to proceedings in the Small Cause Court. The question of transfer of suits from that court to the High Court is regulated by S. 13 of the Letters Patent.

1. (1865) 4 W. R. Mis. 7. 2 (1898) 3 C. W. N. 247.

Srinivasa Aiyar v. Balakrishna Devai.

We must therefore uphold the objection, and we direct that the application be returned to the petitioner to be moved before a Judge or Judges of the court sitting on the original side.

IN THE HIGH COURT OF JUDICATURE OF MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Saminatha Pathan ... Appellant*
(*Petitioner*)

v.

Soranatha Ammal .. Respondent
(*Defendant*).

Saminatha Pathan v. Soranatha Ammal.

C.P. C. (Act XIV of 1882), *S.* 545, *Cl.* (*c*).=*O. xxi. r.* 5 (*c*)—"*For the due performance of such decree or order*"—*Deposit for stay of execution pending appeal on claim petition—Subsequent order for stay of sale of part—Application for refund.*

Proviso (*c*) of S. 545, C. P. C. (1882), cannot be said to contemplate a decree or order in a separate proceeding to be instituted in future.

In execution of a decree for maintenance, attachment was made of certain property. Appellant—a purchaser of the property pending the suit—objected to the attachment, but his objections were disallowed. On appeal from the disallowing order he deposited the maintenance amount and obtained stay of execution. The appeal was dismissed. When the property was about to be sold, the appellant again objected and it was decided that a moiety of the property could be sold in execution of the decree for cost, but not in execution of the decree for maintenance. The appellant under the circumstances applied for a refund of the deposit.

Held:—(1) That it would be open for the appellant to withdraw the money by satisfying the decree for cost.

(2) That the decree-holder could not ask for the money to be kept in deposit on the plea of his intention to sue for a decree for sale of the attached property under the provisions of the Transfer of Property Act and that the money must remain in court till he obtains that decree.

Appeal from the order of the District Court of Tanjore in Interlocutory Application No. 412 of 1909 in A. S. No. 618 of 1907.

G. S. Ramachandra Aiyar for appellant.

N. Rajagopalachari for *M. Subrahmania Aiyar* for respondent.

The Court delivered the following

JUDGMENTS:—*Abdur Rahim* J.—The appellant sought to obtain a refund of the amount deposited by him under orders of the lower appellate court, which directed that sale of the property to which he laid claim in execution of a decree for arrears of maintenance obtained by the respondent against

* A. A. O. No. 266 of 1909. 27th September, 1911.

the second defendant in the suit should be stayed on his making the deposit. The appellant was the first defendant in the suit but there was no decree against him. He, however, purchased the property pending suit, and on the strength of that purchase objected to the attachment and it was in appeal from the order disallowing the objection that the amount which the appellant seeks to withdraw from court was deposited and execution stayed. The order of the court executing the decree was upheld and execution was allowed to proceed. When the property was ordered to be sold the appellant again objected and it was ultimately decided by the lower appellate court that a moiety of the property could be sold in execution of the decree for costs, but not in execution of the decree for maintenance. Under the circumstances the learned District Judge has held that the appellant cannot obtain a refund of the deposit and the reason for his so holding, as we understand the judgment, is that the deposit must be taken to have been made a condition that he would be entitled to withdraw the deposit if he succeeded in the appeal in which the stay was granted. He would take no notice of the result of the subsequent appeal from the order directing sale of the property. I think this is placing too narrow a construction on S. 545, proviso (*c*), of the Code of 1882, corresponding to O. XLI, r. 5, proviso (*c*), of the new Code. What the section says is that security is to be given by the applicant for the due performance of such decree or order as may ultimately be binding on him. Here the appellant's objection in the first instance was disallowed on the ground that it was premature. In his objection for the second time he succeeded to this extent: that it was held that the property could be sold only in execution of the decree for costs. The decree-holder is, moreover, entitled to say that the entire money in deposit shall remain security for the due performance of the decree for costs. But he cannot say that he is going to sue for a decree for sale of the attached property under the provisions of the Transfer of Property Act and therefore the money must remain in court until he has obtained such decree. If such a suit be instituted that will be a separate proceeding Proviso (*c*) of S. 545 of the Civil Procedure Code of 1882 cannot be said to contemplate a decree or order in a separate proceeding to be instituted in the future. It will be open, therefore, to the

Saminatha Pathan v. Soranatha Ammal.

Rahim J.

appellant to withdraw the amount in deposit by satisfying the decree for costs. This appeal, however, fails in as much as the appellant did not offer to pay up the decree for costs, in execution of which his property is under attachment. The appeal is therefore dismissed, but in the circumstances each party will bear his own costs.

Spencer J:—The facts are stated in the lower court's judgment A preliminary objection has been taken as to jurisdiction. The deposit was made under S. 545 of the Civil Procedure Code of 1882 (corresponding to O. XLI, r. 5, of the new Code) under orders of the appellate court as an appeal was pending against an order passed in execution. Under the new Rule 8 of O. XLI the powers of courts under rr. 5 and 6 extend to cases where an appeal is preferred from an order in execution. The Code contains no distinct provision for refund of amounts deposited as security. Courts deal with them under their general powers (S. 151 of the present Code). The appellant might have applied in the first instance under S. 546 [last part corresponding to O. XLI, r. 6 (2)] for the stay of the sale of the immoveable property in which he had an interest by his purchase. Looking to the provisions of S. 583 (corresponding to S. 144 of the new Code) I am not prepared to say that the appellant had no *locus standi* in the District Munsif's Court to apply for the return of his money. This objection too should have been taken earlier.

On the merits, I think the District Judge was right in refusing to allow the deposit to be withdrawn so far as it represented costs and this was a sufficient ground for dismissing his petition. If the appellant had applied to withdraw the amount deposited by him after deducting the respondent's costs, the application might have been allowed. As he applied for the return of the whole amount, his application was rightly rejected in both courts. So far as the deposit represented the maintenance amount, I agree with the view taken by my learned brother whose judgment I have had the opportunity of perusing. This appeal must be dismissed with the remark that if the appellant takes the step of making a fresh application, the lower courts will consider the above remarks in dealing with it. Each party will bear their own costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Komma Somakka	..	Appellant* (in C. M. A. & C. R. P.)
v.		
Kovidalu Pedda Ramiah	..	Respondent (in C. M. A. & C. R. P.)

Komma Somakka v. Pedda Ramiah

Guardians and Wards Act, Ss. 24, 43—*Orders under—Jurisdiction, nature of—Order directing third person to pay money to guardian for minor—Revision—C. P. C., S.* 115.

The District Court has no jurisdiction, under the Guardians and Wards Act, over persons other than the guardian of a minor and cannot enforce rights and claims of the ward for or against the ward by proceedings under the Act which does not provide any machinery for the same; and consequently an order directing the step-mother of a minor to pay the minor's marriage expenses to the minor's guardian purporting to be made under the Act but not really warranted by it is without jurisdiction and is liable to be set aside under S. 115, C. P. C.

Appeal and petition under S. 115 of the Civil Procedure Code against the order of the District Court of Cuddapah in I. A. No. 127 of 1909 (O. P. No. 32 of 1909).

A. Ramachandra Aiyar, for *L. A. Govindaraghava Aiyar* for appellant. There is no provision of law which permits the court to make an order directing a stranger (here a step-mother in possession of the minor's father's property in her own right) not being a guardian of the minor and not being in possession of the minor's property to pay the guardian for the person of the minor for the expenses of the marriage of the minor.

T. V. Seshagiri Aiyar for respondent:—This is not a case of absolute want of jurisdiction. The District Court would, as a civil court, have jurisdiction to go into the matter. No objection was taken to its dealing with the matter under the Guardians and Wards Act. It is submission to jurisdiction, which prevents the party from questioning the validity of the order—*Sadasiva*

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* A. A. O. No. 70 of 1910. 7th November 1911.

C. R. P. No. 245 of 1910.

Komma Somakka v. Pedda Ramiah.

Pillay v. *Ramalinga Pillay*[1]; *Gurdeo Singh* v. *Chandrika Singh & Chandrika Singh* v. *Rashbehary Singh* [2]; *The Manager of the Court of Wards, Kalahasti Estate* v. *Ramasami Reddi*[3].

There is a waiver of the objection to jurisdiction. There could be no question that the estate is liable—*Ranganaikammal* v. *Ramanuja Aiyangar*[4]; *Vaikuntam Arumanayagar* v. *Kallapiran Aiyar*[5].

A. Ramachandra Aiyar, in reply, relied upon *Ledgard* v. *Bull*[6].

The Court delivered the following

Rahim, J.

JUDGMENT:—*Abdur Rahim* J.:—In this case we are asked to revise by way of appeal, or under S. 115, Civil Procedure Code, an order made by the District Judge of Cuddapah upon a petition presented to him under Ss. 24 and 43, Guardians and Wards Act, by the guardian of a certain Hindu female minor praying for permission to give the minor in marriage to a certain person mentioned in the petition, and for an order directing the appellant in this appeal, who is the surviving widow of the father of the minor girl and in possession of his estate, to pay Rs. 800 for the expenses of the contemplated marriage. The appellant appeared in answer to the notice and pleaded that, under the circumstances mentioned in her counter-petition, she was not liable to make any payment, and that the proposed marriage was not suitable. She took no objection to the jurisdiction of the District Court to make any order against her on the petition, and after hearing the pleaders on both sides the court passed the order: "The petition is allowed with costs. Rs. 300 is sanctioned. Fees Rs. 5." The order, having regard to the prayer in the petition, has the effect of directing the counter-petitioner to pay Rs. 300 and costs to the guardian. No issues were framed and no evidence appears to have been taken and apparently none was adduced by either party.

The first question argued is that the order is bad for want of jurisdiction and must be set aside on that ground. Now there can be no doubt that so much of the order as directs the appellant to pay Rs. 300 to the petitioner for purposes of the minor's

1. (1875) 2. I. A, 219.
2. (1907) I. L R 36 C. 193.
3. (1905) I. L. R. 28 M. 437.
4. (1911) 10 M.L.T. 57 S. C. 21 M.L.J. 600.
5. (1900) I. L. R. 23 M. 512.
6. (1886) I. L. R. 9 A. 191 (P. C.)

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marriage is not warranted by any provision of the Guardians and Wards Act. This is conceded by Mr. Seshagiri Iyer who appeared for the respondent. But he contends that as the District Court could have, in a suit properly framed for the purpose, passed a decree to the same effect, this order cannot be said to have been passed without jurisdiction but at the worst there was only an irregularity in the way the court assumed jurisdiction, and as no objection was taken to the course adopted at the time, it must be deemed to have been waived and the order cannot now be impeached for want of jurisdiction or on the ground of irregular exercise of jurisdiction. He does not, however, contend, and very rightly, that if the order is without jurisdiction, altogether, either waiver of objection or consent on the part of the appellant to the course followed could make the order valid. There can be no doubt that the District Court which passed the order appealed against could have, in a regularly instituted suit, passed a decree against the appellant to substantially the same purport. At the same time the power vested in the District Court under the Guardians and Wards Act is so totally dissimilar to its power as a court of ordinary civil jurisdiction that I think it will be going much too far to say that an order purporting to be made under, but which in fact is not warranted by, the provisions of that Act can be treated as a decree passed in a suit. The two jurisdictions are wholly distinct though exerciseable by the same official. It is not a case of the exercise of the same jurisdiction by different forms of procedure.

The whole scheme of the Guardians and Wards Act, generally speaking, is to entrust to the District Court the duty of looking after the welfare of the minor's person and property, and for this purpose it gives it power to appoint a guardian to have charge of the minor's person and property as the most feasible mode of discharging its duty. The guardian is really the hand of the District Court and is to act under its advice, control and constant supervision. The Act does not profess to give the District Court any power or authority over persons other than the guardian of the minor except in so far as it deals with the question as to who is the proper person to be appointed guardian or whether a particular guardian should be removed or not and

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for the purpose of restoring the ward to the custody of the guardian. Otherwise the enforcement of rights or claims of the ward or against the ward is left to be regulated by ordinary proceedings by suits and the Act does not provide any machinery for deciding upon or enforcing any such claims, though so far as the guardian is concerned the District Court is vested with very wide disciplinary powers over him in order that it may enforce the orders passed against him under the Act. The jurisdiction or power conferred upon the District Court by this Act is of a very special and limited character and the procedure prescribed under the Act, which is of a summary character, though appropriate for the determination of questions arising therein, is very different from the procedure laid down by the Civil Procedure Code for the trial of suits. That being so, can we uphold an order such as this, which purports to be made under, but is not in fact warranted by, the provisions of that Act as a decree passed in a suit? After the best consideration I have been able to give to the matter, my conclusion, as already indicated, is that the question must be answered in the negative.

In dealing with the question certain facts must be borne in mind. In the first place the order in question in this case is impeached in the course of the same proceedings by way of appeal and not collaterally as when a party who has allowed a decree or order to become final impugns its validity for the first time when it is sought to be enforced in execution or wishes to reopen the question in a subsequent proceeding treating the previous adjudication as null and void. Then, this is not a case in which the parties expressly agreed that the court should adopt the particular course alleged to be beyond its power, or where one party by his conduct has estopped himself from raising the question of validity of a particular proceeding. Here all that happened was, the appellant failed to object to the District Court dealing with the matter by proceeding under the Guardians and Wards Act. Again, the District Court purported to make the order in the exercise of a jurisdiction conferred on it by a special statute very different in its nature, scope and the way in which it is to be exercised from its jurisdiction as a court of ordinary civil jurisdiction. It is not, therefore, a case in which a court purports to act in the exercise of a particular jurisdiction but

adopts a form of procedure prescribed for one department of that jurisdiction, rather than another.

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If these facts be borne in mind, the present case is easily distinguishable from the class of cases relied on by Mr. Seshagiri Iyer. For instance in the case of *Sadasiva Pillai* v. *Ramalinga Pillai* [1] the question was whether mesne profits which accrued after the decree and were not expressly provided for in it could be recovered from the respondent in the appeal before the Judicial Committee, in execution or only by a separate suit. It appeared that the respondents had executed bonds to account for mesne profits after the date of decree in accordance with an order which was not objected to either in the first instance or by way of appeal, and their Lordships held that the liability to account was made " a question relating to the execution of the decree" or that at all events the respondents by their own agreement and subsequent conduct were estopped from saying that the mesne profits in question were not payable under the decree according to the principle laid down in *Pisani* v. *Attorney-General of Gibraltar* [2]. On the question whether the order was without jurisdiction they observe: " The court had a general jurisdiction over the subject-matter though the exercise of that jurisdiction by the particular proceeding may have been irregular." The court in that case was in fact exercising its ordinary civil jurisdiction though by means of a proceeding prescribed for the execution of decrees and not for the trial of suits. The principle thus enunciated by the Privy Council has no application therefore to this case. Nor is this a case, as I have already pointed out, of estoppel. In *Pisani* v. *Attorney-General of Gibraltar*[2] the Attorney-General had filed an information claiming for the Crown certain lands which belonged to a deceased person as escheat for want of heirs. The defendants put forward their several claims to the land, and on the motion of the Attorney-General, when he found that he failed to establish the claim of the Crown, it was agreed among all the parties that the rights of the defendants, as between themselves should be declared, whatever might be the event of the suit regarding the claim of the Crown. By the decree it was declared that the lands had not escheated to the Crown and

1. (1875) I.L.R 2 I. A. 219. 2. L.R. 5 P. C. 516.

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that a certain will of the deceased was valid. On an appeal being preferred to the Judicial Committee from that decree, a preliminary objection was taken to the competency of the appeal on the ground that the decree, so far as it declared the rights of the defendants, must be treated as an award of an arbitrator. It was held that the agreement was binding but the preliminary objection was overruled on the ground that, though the course adopted by consent was a deviation from the *cursus, curiae*, yet, as the parties meant to keep themselves *in curiae* and the judge clearly so understood them, there was an appeal. The court had jurisdiction over the subject and the assumption of the duty of another tribunal was not involved in the question. They then pointed out that departures from ordinary practice by consent are of frequent occurrence, and that unless there is an attempt to give the court a jurisdiction which it does not possess or something occurs which is such a violent strain on its procedure that it puts it entirely out of its course so that the court of appeal cannot review the decision, such departures have never been held to deprive either of the parties of the right of appeal. Mr. Seshagiri Iyer has not raised any question as to our power to revise the order. Then is not this a case of assumption by one tribunal of the duties of another? As I have tried to show, the powers and the duties of the District Court under the Guardians and Wards Act are wholly dissimilar to its powers and duties as a court of civil jurisdiction, and when it acts under such special statutes, it must, in my opinion, be regarded to be acting as a tribunal other than a tribunal of general civil jurisdiction. When, as here, the difference between the two jurisdictions is not one merely of form but of a radicalnature having regard to their scope, subject matter, and the rules regulating their exercise, the fact that both are vested in one and the same tribunal would not make an order which is made in the exercise of one jurisdiction liable to be regarded as if it was properly made in the exercise of the other jurisdiction.

In *Ledgard* v. *Bull*, [1] another judgment of the Privy Council, all that is laid down is that in a suit tried by a competent court the parties having without objection joined issue and gone to trial upon the merits, cannot subsequently dispute the

1. (1886) I.L.R. 9 A. 191.

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jurisdiction on the ground of irregularity in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit. But in this case, as I view the matter, the liability of the appellant never formed the subject of trial by the District Court as a court of general civil jurisdiction. The same answer applies to the case reported in *Gurdeo Singh* v. *Chandrika Singh & Chandrika Singh* v. *Rashbehary Singh*[1], in which the learned Judges discuss at length the distinction between inherent absence of jurisdiction and irregular assumption of jurisdiction.

I think the proceeding in question ought also to be set aside on the ground that it is such a violent strain on the procedure that it puts it entirely out of its course, so that the court of appeal cannot review the decision. I may observe here that the course adopted by the District Court not being by agreement of the parties there could be no question of its acting as arbitrator so as to deprive either party of his right of appeal. If the case had been tried as a suit under the Civil Procedure Code, it would have to be tried in the court of the District Munsif and the parties would then have a right of successive appeal to the District Court and to the High Court. There is no authority to which our attention has been drawn which would justify us in saying that because the appellant did not take objection to the course adopted by the District Court he must be taken to have waived such rights of appeal as he would have had if the matter had been properly tried as an action. If the proceeding in question were to be treated as one under the Guardians and Wards Act there would be no appeal as it is not covered by S. 47, and if it be regarded as a decree in a suit tried by the District Court in its ordinary civil jurisdiction, then we must hold that by mere failure to object to the District Court dealing with the matter under the Guardians and Wards Act, the appellant has deprived himself of the right of second appeal which otherwise he would have had. This I am not prepared to hold in the absence of express authority. Further, if the matter had been tried as a civil action, issues would have had to be framed and there would have been a proper judgment and a decree. As it is, there are no issues, no judgment, and no decree, and it is difficult to see how we can properly revise the order of the District Court on the merits.

1. (1907) I.L.R. 36 C. 196.

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All this shows that the proceeding of the District Court is so completely outside the ordinary course of trial of civil actions that it must be held to be without jurisdiction. Besides, even if it were possible to treat the order as a decree in an action it would be liable to be set aside on the ground that there has been no proper trial. But as I am of opinion that the order has been made without jurisdiction under the Guardians and Wards Act it must be set aside under S. 115, Civil Procedure Code. I would therefore allow the Civil Revision Petition and set aside the order of the District Court in so far as it directs the counter-petitioner in that court to pay Rs. 300 with costs in this court and leave each party to bear his own costs in the District Court.

Spencer J :—Assuming that the District Judge intended his order—"The petition is allowed with costs. Rs. 300 is sanctioned. Fees Rs. 5-0-0"—to be tantamount to a money decree for Rs. 300 and costs, and executable as such against the respondent, I agree with my learned brother, whose judgment I have had the advantage of reading, that the order was irregular and without jurisdiction although the question before us is not covered by authority and presents some difficulty.

In the petition presented under S. 10 of the Guardians and Wards Act for the appointment of a guardian for the minor it was stated that the property left by the minor's father devolved on his second wife, the respondent, and is in her enjoyment, and that the minor has no property whatever. It was not alleged at the hearing of the present appeal that the minor has any separate estate. Her step-mother has, it appears, a widow's estate and she has only an expectancy. It is possible that the District Judge, in passing orders about the minor's marriage, may have lost sight of the fact that there was no fund under the control of the court out of which the marriage expenses might be defrayed, and this surmise is rendered probable by the use of the word "sanctioned" instead of "decreed." If the minor had property of her own and if the District Judge only intended to fix the amount which, in his opinion, was a suitable amount to spend on the minor's marriage there would clearly have been nothing beyond his competence in the order passed. The petition under Ss.23 and 47, however, contained a prayer to direct the respondent to pay Rs. 800 for marriage expenses and both parties have

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Spencer J.

construed the order as a direction to her to pay a sum of Rs. 300. Treated as such the Guardians and Wards Act gave the judge no power to make the order and I agree that it should be set aside as without jurisdiction, the parties to bear their own costs in the District Court and the respondent to bear his own and the appellant's costs in this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Sengoda Goundan .. Appellant*
(*Plaintiff*)

v

Varadappan *alias* Raju Goundan & others .. Respondents
(*Defendants*)

Land tenure—Tree patta—Cancellation—Incidents—Position of tree pattadar and land pattadar.

Sengoda Goundan v. Raju Goundan.

The cancellation of a tree patta means that Government will no longer make any demand on the pattadar for revenue in respect of the trees; and in the absence of any contention or proof that the Government resumed possession of the trees or made any grant of them to the land pattadar, the tree pattadar is entitled to be in possession of the trees.

Quaere:—How far the tree pattadar *quoad* the Government is affected by the cancellation of the tree patta and whether the Government can resume ownership of the trees.

Second appeal from the decree of the District Court of Salem in A. S. No. 188 of 1909 presented against the decree of the Court of the District Munsiff of Namakkal in O. S. No. 1192 of 1908.

In this case the plaintiff had pattas issued to him for several years by the Government in respect of certain trees standing on certain land in Salem District. Three years after the Government cancelled the issue of the tree pattas, the plaintiff sued the owner of the land for the recovery of the trees. The lower court held that the plaintiff lost his right to the trees by the cancellation.

S. Varadachari for *T. R. Venkatarama Sastri* for appellant.

V. Viswanatha Sastri for respondent.

S. Varadachari.—The right to the trees is not gone by the cancellation. The two decisions which have some bearing on the

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* S. A. No. 726 of 1910. 7th November 1911.

Sengoda Goundan *v.* Raju Goundan.

question are *Theivu Pandithan* v. *Secretary of State for India*[1] and Reference under S.39 of Act V of 1882[2]. I refer also to B.S.O. 18 (1900 Ed.) p 36; Maclean's Edn. B. S. O. 6, p. 5, 6, 7; to the Boards S. O. 18 (1907) which says that after cancellation the right to the trees vests in Government and that the usufruct in the tress is destroyed. [*Court.*—Which patta was earlier, the one relating to the land or the one relating to the trees?] No evidence on this point, but separate pattas for each were existing for at least 20 years. Though I cannot cut the trees I can have the usufruct.

V. Viswanatha Sastri.—When the tree patta is cancelled the title to the trees is gone—Board's S. O. 18. A patta for the land after the cancellation of the patta of the trees with a higher revenue is a patta for the full ownership of the land. With the land the trees go—Salem District Manual, 434. [*Court.*—Not where there are distinct rights with regard to each ? Why not the plaintiff succeed on his previous possessory right ?]

The Court delivered the following

JUDGMENT :—In this case the plaintiff (appellant) held a pattah for certain trees on land in certain survey fields, and the defendants (respondents) held the pattah for the land. The plaintiff had possession of the trees for more than twenty years prior to 1906. In that year, the Revenue authorities cancelled the pattah which they had given to the plaintiff. The defendants then interfered with the plaintiff's enjoyment of the trees and deprived him of their possession. The plaintiff therefore brought this suit to recover possession of the trees and for mesne profits.

The District Munsif gave him a decree but the District Judge reversed it on appeal and dismissed the suit. We think the decree of the District Munsif is right.

The successive Standing Orders of the Board of Revenue, Madras, in regard to tree pattahs are found at pages 5, 6 and 7 of Maclean's Edition of 1878, and at pages 36 and 40 of the Government Editions of 1900 and 1907 respectevely.

The respective rights of parties in the position of the plaintiff and defendants, who for the sake of brevity are called tree-pattadars and land-pattadars respectively are discussed in the

1. (1898) I.L.R. 21 M 433 (F.B:) 2. (1889) I.L.R. 12 M. 203.

Sengodo Goundan v. Raju Goundan.

cases reported in *Reference under S.* 39 *of Madras Forest Act* [1] and *Theiva Pandithan* v. *Secretary of State for India* [2]. It was there held that the tree pattadar "has an interest, during the continuance of the patta, in the tree itself and in all that is necessary for the growth of the tree including the soil in which it grows."

The District Judge held that that the plaintiff's interest in the trees ceased to exist as soon as the pattah was cancelled and that he could not rely on his possession because it was not really adverse to the defendants but was rather that of a licensee and when the tree pattah was cancelled the effect was to "complete the land pattadar's natural and usual proprietory rights in his land by cancelling the limitation which the existence of the tree pattah imposed on him.

We do not think that this view is correct. So far as appears in this case the only effect of the cancellation of the tree patta was that Government no longer made any demand on the pattadars for revenue in respect of the trees. It is not shown or even contended that Government resumed possession of the trees, or made any grant of them to the defendants. The District Judge no doubt states that when both pattahs were in existence the land pattadar was credited with whatever revenue was collected from the tree pattadar and that on the cancellation of the tree patta the whole revenue was payable by the land pattadar. But this cannot be taken to evidence a grant of the trees to the land pattadar and the District Munsif points out that no revived pattah was issued to the latter enhancing the revenue payable by him. The Government is no party to the suit and it is unnecessary to consider how far, if at all, the position of the tree pattadar *quoad* the Government is affected by the cancellation of the tree pattah. For all that appears the rights of the tree pattadar may have been and probably were in existence before the land patta was granted. Even if it is assumed that Government by cancelling the tree pattah could and did resume complete ownership of the trees, there was no grant of them to the defendants and there is no foundation for regarding the defendants as the owners of the trees. The plaintiff was in possession of the trees until dispossessed by the defendants some

1. (1889) I.L.R. 12 M. 203. 2. (1898) I.L.R. 21 M. 433 (F.B.)

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two years prior to the suit. The defendants having no title as owners were mere trespassers, and the plaintiff was entitled to rely on his possession in a suit to eject them—*Narayana Rao* v. *Dharma Char* [1] and *Subbaraya Chetty* v. *Aiyasawmi Iyer*. [2]

On this ground we must set aside the decree of the District Judge and restore that of the District Munsif with costs in this and the lower appellate court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Spencer.

Govinda Pillai	..	Appellant in both * (*1st Plaintiff*)
v.		
Meenatchi Achi	...	Respondent in No. 150 (*2nd Defendant*)
Ganapatti Pillai	..	Respondent in No. 151. (*Representative of the 3rd Defendant*).

Govinda Pillai v. Meenatchi Achi.

C. P. C., S. 60, Cl. (n)—Right to future maintenance—Crops in land allotted for maintenance.

Cl. (*n*) of S. 60, C. P. C., interdicts attachment of a mere right to future maintenance and not of a debtor's property or any interest in property though such property or interest might have been granted to him as for maintenance; and consequently, the crops standing on land allotted to a widow for maintenance do not fall within the interdiction in Cl. (*n*) of S. 60.

Appeal from orders of the Subordinate Judge's Court of Negapatam in E. A. Nos. 80 and 81 of 1910 in E. P. No. 222 of 1909—(O. S. No. 92 of 1900).

Certain land was allotted to his two widows and his daughter for maintenance by the will of the testator who endowed the major portion of his properties for certain charities for which he appointed the present decree-holders as trustees. As the widows and the daughter disputed the genuineness of the will the trustees filed a suit and obtained a decree declaring the validity of the will and the charity and also obtained costs and mesne profits. In execution of the decree for costs and mesne profits the land allotted for maintenance was sought to be attached and the

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* A. A. P. No. 150 and 151 of 1910 — 4th October, 1911

1. (1902) I. L. R. 26 M. 514.
2. (1908) I.L.R. 32 M. 86.

Govinda Pillai *v.* Meenatchi Achi.

lower court dismissed the application for attachment holding that the land was given for future maintenance. Against that order the present appeal was preferred.

K. Srinivasa Aiyangar and *C. Krishnamachari* for appellant.

T. R. Venkatarama Sastri for respondent.

C. Krishnamachari referred to *Munisami* v. *Ammani* [1]; *Dilnali* v. *Appaji* [2]; distinguishing them from the facts of the present case as there lands themselves and not the crops were attached.

If property is given for maintenance that property can be attached in execution of a decree against the maintenance holder; because the payment of maintenance does not depend upon the will of anybody else, for it is property of the holder, however limited the interest may be—*Tarasundari Debi* v. *Saroda Charan Banerjee* [3]. Such a right in the land is not a right to future maintenance. Crops on such land or a portion are attachable and saleable.

Babuana allowances are attachable—*Rameswar Singh* v. *Jihendar Singh* [4]; *Durga Dutt Singh* v. *Rameswar Singh* [5]; *Ramchandra Marurari* v. *Mudheswar Singh* [6].

T. R. Venkatarama Sastri:—Crops standing on land are only for future maintenance. [*Court.*—Is it not her property?] It is not her property until it is harvested by her. I rely on *Diwali* v. *Appaji* [2]; *Munisami* v. *Ammani Ammal* [1]. [*Court.*—Where is the futurity or uncertainty?]

The Court delivered the following

JUDGMENT:—The first question argued is whether the crops growing on one veli of land which, under the terms of the will, the second defendant, one of the two widows of the testator, is to enjoy for her maintenance, are liable to be attached in execution of the plaintiff's decree. The Subordinate Judge is of opinion that the crops in question are precluded from attachment by virtue of the provisions of S. 60, Civil Procedure Code, which by clause (*n*) exempts a right to future maintenance for seizure in execution of a decree. We shall assume for the purposes of this argument that the clause would apply whether

1. (1904) 15 M. L. J. 7.
2. (1886) I. L. R. 10 B. 342, 345.
3. (1910) 12 C. L. J. 146.
4. (1905) I. L. R. 32 C. 683.
5. (1909) I. L. R. 36 C. 943 (P. C.)
6. (1906) I. L. R. 33 C. 1158.

Govinda Pillai v. Meenatchi Achi.

the right to maintenance is derived under the general Hindu or Mahomedan law or under instruments in the nature of deed or will. But it seems to us that the Subordinate Judge is quite wrong in his view that what is attached in this case can be said to be a right to future maintenance. It may be well that the second defendant is given the land to be enjoyed by her during life in lieu of the maintenance to which she would be entitled as a Hindu widow, but what she acquires under her grant is not a right to maintenance but to certain property or rather the usufruct of that property. The produce of the land as it accrued becomes at once her property and the learned vakil for the respondents rightly concedes that the second defendant might dispose of it in any way she chose. That being so, it cannot be treated as standing on the same footing as a right to maintenance. The crops are her property and as such must be available to answer her debts. What is interdicted by the legislature is attachment of a mere right to future maintenance and not of a debtor's property or any interest in property though such property or interest might have been granted to him or her for maintenance. The Subordinate Judge relies upon the case of *Munisawmi Naidu* v. *Ammani Ammal* [1] which follows a decision of the Bombay High Court, *Diwali* v. *Appaji Ganesh* [2], in support of his view. No doubt there are words in the judgments in the two cases which might be taken to lend some countenance to the proposition accepted by the Subordinate Judge, but it seems to us that both the decisions really proceed upon the particular provisions of the instruments with which the learned Judges were concerned.

However that may be, we have no hesitation in holding that clause (*n*) of S. 60 has no application to the present case.

[Their Lordships then proceeded to deal with another question in the case not pertinent to this report.]

The result is that the Appeal No. 150 will be allowed with costs and Appeal 151 will be dismissed with costs.

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9. (1904) 15 M.L.J. 7   10. (1886) I.L.R. 10 B. 342.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Sankaran Nair.

A Gopala Aiyar .. .. Appellant* (*Defendant*)

v

Ramaswamy Sastrigal .. .. Respondent (*Plaintff*).

T. P. A., S. 6 (e)—Mere right to sue—Damages for breach of contract—Contract to pay debts of another—Breach—Limitation.

Gopala Aiyar *v.* Ramaswamy Sastrigal.

A right to sue for damages for breach of contract is a mere right to sue within S. 6 (*e*), T. P. A. Where the defendant undertakes to pay plaintiff's debts, the plaintiff must, in order to entitle him to sue, show a breach of contract by defendant. That he himself paid the debts can give him no cause of action; nor will a repudiation of the agreement by defendant make time to run against plaintiff, if the plaintiff chooses to treat the contract as subsisting. If the plaintiff paid the debts before the expiry of a reasonable time after the agreement, the defendant may well plead want of reasonable time for him to perform the contract and that consequently there was breach. If the plaintiff waited till the expiry of a reasonable time, the defendant's breach of contract would give him a cause of action whether plaintiff himself paid the debts or not. The question as to what is a reasonable time is a question of fact.

Where the agreement was on 15th January 1898 and the suit was brought for breach of contract on 5th December 1904:—*Held* that the plaintiffs' suit was barred on the expiry of 3 years from 15th January 1901 on the basis that 3 years was a reasonable time for performance.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 150 of 1906, presented against the decree of the Court of the District Munsif of Tiruvalur in O. S. No. 429 of 1904.

This second appeal coming on for hearing in the first instance before their Lordships the Chief Justice and Mr. Justice Krishnaswami Aiyar on 8th November 1909,

the Court delivered the following

JUDGMENT:—Exhibit E purports to be a transfer by Sundari Ammal, to the plaintiff, of a right to sue for damages for breach of contract between Sundari Ammal and the defendant (Exh. A) the breach of contract having occurred prior to the execution of Exh. E. It seems to us that this a mere right to sue within the meaning of S. 6 (*e*) of the Transfer of Property Act and consequently could not be transferred. On this point we agree with the decision of the Calcutta High Court in *Abu Muhammad* v. *S. C. Chunder*[1]. We are opinion that even prior to the amendment of the Transfer

* S. A. No. 133 of 1907. 11th April 1911.

1. (1909) I.L.R. 36 C. 345.

Gopala Aiyar v. Ramaswamy Sastrigal.

of Property Act a mere right to sue for damages for breach of contract, was not assignable under the common law. The Advocate-General has contended that the fact that the debts which the defendant contracted under Ex. A to discharge were debts owing by the plaintiff and that the plaintiff has in fact paid those debts gives the plaintiff a right to sue the defendant under Exh. E. We know of no principle of law or equity which gives any such right. The plaintiff, however, alleges in his plaint (paragraphs 4 & 10) a personal promise by the defendant to the plaintiff to pay the debts in question. As to this there was no issue and there has been no finding. In view of the fact that the point now taken before us was not raised in the court below, we think the plaintiff should have an opportunity of showing, if he can, that the personal agreement by the defendant with the plaintiff, which is alleged in the plaint, was in fact made.

The case will go back to the District Judge for a finding on this question. Further evidence may be taken. The finding should be submitted within two months, and ten days will be allowed for filing objections. This order is without prejudice to the right of the appellant to rely on the other grounds of appeal.

In compliance with their Lordships' direction the District Judge of Tanjore submitted the following

FINDING.—The personal agreement by the defendant with the plaintiff to pay the debts in question, as alleged in paragraphs 4 and 10 of the plaint, was made.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for appellant.

T. R. Venkatarama Sastry for the *Advocate-General* (*P. S. Sivaswamy Aiyar*) for respondent.

T. R. Ramachandra Aiyar :—Defendant agreed on 15th January 1898 for a consideration to pay debts due by plaintiff to other persons. Plaintiff says that the defendant not having paid the debts he was obliged to pay his creditors on various dates. The suit was brought on 5th December 1904. The question was whether the suit was in time. The contract was broken as soon I refused to perform. No further act was necessary to give the plaintiff a cause of action. Limitation runs from that date and damages could be recovered even on the day I broke the contracts even if the debts had not become payable. But in this case all the debts were payable even on the date of agreement—*Kumar Nath Bhattacharjee* v. *Nobo Kumar Bhattacharjee* [1];

1. (1898) I.L.R. 26 C. 241.

Gopala Aiyar v. Ramaswamy Sastrigal.

Daswant Singh v. *Syed Shah Ramjan Ali* [1]; *Dorasinga Tevar* v. *Arunachalam Chetti* [2]; MAYNE on *Damages*, 405. At the most he could have only a reasonable time after the breach. Certain payments have been admittedly made more than three years ago.

T. R. Venkatarama Sastri :—Plaintiff is entitled, notwithstanding repudiation, to pay the debts himself and bring a suit within three years of my payment. [*C.J.*—There is no obligation on the promisee's part to treat the contract as at an end in spite of repudiation: S. 39, Contract Act.] Just so. I need not even voluntarily pay. I can wait. I can take advantage of limitation if suits are not filed within time. *Kumar Nath Bhattacharjee* v. *Nobo Kumar Bhattacharjee*[3] is, on the facts of the case, really in my favour just like *Thangammal Nachiar* v. *Subhammal.* [2] In cases of sale with a stipulation that the purchaser should pay the vendor's debts the Privy Council has recently held that there is an implied indemnity to save the vendor from the liability to pay the debts—*Izaut-un-nisa Begum* v. *Kunwar Perra Singh.*[4] *Dorasinga Tevar* v. *Arunachalam Chetti* [4] only holds that the promisee *may* sue on repudiation ; there was no question of limitation there. [*Court.*—If the plaintiff waits and pays, it is not for breach of contract but for reimbursement for damages he had had to pay on the breach that he sues.] It is unnecessary for me to say that. *Dorasinga Tevar* v. *Arunachalam Chetti*[6] is wrong. Plaintiff is entitled to date his cause of action as the date of his final discharge or each discharge. If plaintiff had to make a part payment, being unable to make a complete payment then and there, he can tack it on to the other portions of the payment. It is the *discharge* of the debts that gives me the cause of action. Why should I sue each time I pay a small sum ?

T. R. Ramachandra Aiyar, in reply, referred to S. 46 and *Subbaraya Reddi* v. *Manicka Gounden*[7] and argued that there was no repudiation.

This second appeal coming on for final hearing after the return of the finding of the lower court, the Court delivered the following

1. (1907) 6 C.L.J. 398.
2. (1899) I.L.R. 23 M. 441.
3. (1898) I.L.R. 26 C. 241.
4. (1905) 16 M.L.J. 120.
5. (1909) I.L.R. 31 A. 583 (P.C.)
6. (1899) I.L.R. 23 M. 441.
7. (1911) M. W. N. 265.

Gopala Aiyar v. Ramaswamy Sastrigal.

JUDGMENT:—The District Judge has found a personal agreement by the defendant with the plaintiff to pay certain debts owing by the plaintiff. The plaintiff has paid these debts. The date of the agreement was January 15th, 1898, and the suit was instituted on December 5th, 1904. The question is: Is the plaintiff's claim to recover under the agreement in respect of the debts paid within three years from the institution of the suit barred by the law of limitation?

The contention on behalf of the plaintiff was that his cause of action arose on the dates of payment of the several debts which the defendant had agreed to pay. The defendant's contention was that the plaintiff's cause of action arose on the repudiation of his liability under the contract by the defendant, or on the breach of the contract by the defendant, the breach to be deemed to have occurred on the expiry of a reasonable time from the date of the contract (S. 49 of the Indian Contract Act.)

The District Judge finds against the fact of the alleged repudiation, but assuming the defendant repudiated his agreement more than three years before the institution of this suit, we are of opinion that time would not begin to run as against the plaintiff from the date of the repudiation of the agreement by the defendant.

Under S. 39 of the Indian Contract Act which embodies the principle of law enunciated in *Hochster* v. *De LaTour*[1] and *Frost* v. *Knight*[2] the promisee *may* put an end to the contract. He is not *bound to*. If he is entitled to treat the contract as subsisting, and he does treat it as subsisting, it is clear that no cause of action arises on the repudiation of the contract by the promisor. See *Subbaraya Reddi* v. *Manicka Goundan*[3].

The plaintiff's answer to the defendant's second contention is that his cause of action was not the defendant's failure to fulfil his contract, but the fact that he had discharged a liability which the defendant had agreed to discharge. The allegation in the plaint is that the creditors pressed the plaintiff, and some of them sued him. This does not seem to be denied in the written statement, but there was no issue on the question and there is no finding that the payment was otherwise than voluntary.

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*11th April 1911.

1. (1853) 2 E. & B. 678. 2. (1872) L. R. 7 Ex. 111.

3. (1911) M.W.N. 265.

Gopala Aiyar v. Ramaswamy Sastrigal.

If the payment was voluntary we do not think the case comes within the principle of the decision in *Kumar. Nath Bhattacharjee* v. *Nobo Kumar Bhuttacharjee*[1] where the suit was for contribution under an agreement in respect of a debt which had been realised by the sale of the plaintiff's property. In *Dorasinga Tevar* v. *Arunachalam Chetti*[2] the defendant agreed to discharge a debt due by the plaintiff to a third party and to pay the plaintiff any damage he might sustain if the defendant failed to discharge the debt. No time was fixed for the performance of the contract. The defendant having failed to discharge the debt for nearly three years, it was held he was bound to do so within a reasonable time, and that his failure to do so during the three years was a breach of his contract, notwithstanding that the third party had not enforced his claim against the plaintiff.

In the present case the plaintiff must show a breach of contract by the defendant. The fact that he himself paid the debts, in itself, in our opinion, gives him no cause of action. If he paid them before the expiry of a reasonable time after the agreement, the defence would have been open to the defendant that he had not had reasonable time to fulfil his contract, and that he had consequently not broken his contract. If the plaintiff waited till the expiry of a reasonable time the defendant's breach of contract would give him a cause of action, whether he himself paid the debts or not (see *Dorasinga Tevar* v. *Arunachalam Chetti* [2]). The question as to what is a reasonable time is a question of fact—Contract Act, S. 46. In *Dorasinga Tevar* v. *Arunachalam Chetti* [2] the court held a defendant, who had failed to fulfil a contract similar to this for nearly three years, had failed to do so within a reasonable time.

We do not think it can be put more favourably to the plaintiff than to say that the reasonable time in this case is three years. We hold, therefore, that the defendant's contract was broken on the expiry of three years from the date of the agreement, *i. e.*, on January 15th, 1898, and that the plaintiff's right to recover became time-barred on the expiry of three years from January 15th, 1901, *i. e*, on January 15th, 1904.

The result is, the appeal is allowed and the plaintiff's suit is dismissed with costs throughout.

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1. (1898) I.L.R. 26 C. 241.
2. (1899) I.L.R. 23 M. 441.

Venkatesa Aiyangar v. Kamalammal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Venkatesa Iyengar .. Appellant* (*Plaintiff*)

v.

Kamalammal and others .. Respondents (*Defendants*).

Judgment on holiday—Not a nullity—Madras Civil Courts Act, S. 30—C. P. C., O. xx, r. 1—"Open court."

A judgment pronounced on a holiday is not on that account a nullity though, if any party is injuriously affected by a court doing judicial work on a day when the court is closed, he will be entitled to redress.

The expression "open court" in O. xx. r. 1, C. P. C., refers to the place and manner of the pronouncement of judgment.

The provision with regard to the time of pronouncement is merely that it shall be at once or on some future day of which notice shall be given. Holidays are not excepted provided notice be given. S. 30 of the Madras Courts Act III of 1873 merely gives permission to adjourn, and there is no prohibition of the doing of all work of a judicial character during the time when the court is adjourned.

Second appeal from the decree of the District Court of South Arcot in A. S. No 132 of 1909 presented against the decree of the Court of the District Munsif of Panrutti in O. S. No. 221 of 1908.

G. S. Ramachandra Aiyar for appellant.

V. C. Seshachari for respondent.

The Court delivered the following

JUDGMENT:—In this case we intimated our opinion at the hearing that the conclusion arrived at by the lower appellate court regarding the plaintiff's title was binding on us, the question being purely one of fact. But the validity of that court's judgment was also attacked on the ground that the District Judge acted without jurisdiction in delivering his judgment on the 29th December 1909 when the court was closed for the Christmas holidays.

We are of opinion that the delivery of judgment on a holiday (we are taking it that the 29th December 1909 had been notified as a general holiday) is not illegal. It is not contended that there is any express provision of law prohibiting the performance of any judicial work on a holiday or laying down that a judgment delivered on a hoilday shall be void. S 30 of the Madras Courts Act III of 1873 enacts: "The High Court may

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* S. A. No. 1027 of 1910. 14th December, 1911.

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permit the civil courts under its control to adjourn from time to time for periods not exceeding in the aggregate two months in each year." The section merely gives permission to adjourn. There is no prohibition of the doing of all work of a judicial character during the time when the court is adjourned. Under whatever authority the court may have been adjourned during the Christmas holidays, the appellant has not shown that the Judge was prohibited from doing any particular kind of work during the period. If any party is injuriously affected by a court doing any judicial work on a day when the court is closed he will, no doubt, be entitled to redress for the grievance. But it is not contended in this case that the appellant has been prejudiced by the delivery of judgment on the 29th December. Reliance has been placed on O. xx, r. 1, of the Civil Procedure Code which provides that the court shall pronounce judgment in open court either at once or on some future day of which due notice shall be given to the parties or the pleaders. The expression 'in open court' refers to the place and manner of the pronouncement of judgment. The provision with regard to the time of pronouncement is merely that it shall be at once or on some future day of which notice shall be given. Holidays are not excepted provided notice be given. With regard to the place where the judgment is to be pronounced it has been held that the pronouncing of the judgment out of court is only an irregularity and will not be a good ground of appeal. See *Sree Sree Nilmony Singh Deo* v. *Bhobany Churn Panda*[1]. In other words the section is only directory in its nature and does not absolutely prohibit as illegal the pronouncement of judgment otherwise than in accordance with its provisions. Our attention has not been drawn to any authority in favour of the appellant's contention. In BLACK on *Judgments*, Vol. 1, S. 182, the learned author says: "In regard to other (than Sundays) legal holidays the general rule is that unless the statutes recognising or creating them expressly prohibit the exercise of judicial functions upon them the courts may validly render judgments and transact their other usual business. And even if they are declared non-judicial holidays, this will not hinder the performance of ministerial acts. Thus the statute in Georgia declaring the

1. (1864) March 327.

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4th of July a holiday does not prohibit the courts from sitting on that day, or make a judgment rendered on that day void except when that day falls on Sunday. So it is held that a judgment rendered by a Justice of the Peace on Thanks-giving Day is not void." The same learned author in his article on *Judgments* in the "American Cyclopædia of Law and Procedure," Vol.23, p.625, observes : "Unless authorised by a statute or by the consent or agreement of the parties, a valid judgment cannot be rendered in vacation, this being a judicial act which can be performed only when the court is in session." This passage is not inconsistent with the statement of the author in his book on *Judgments*, for here he is referring to cases where under statute the court is bound to perform its judicial acts during term time and he points out in a footnote that 'under a statute authorising the courts to take cases under adjournment after trial or hearing at the term, it is held that the judgment may be rendered in vacation.' In WELLS on *Jurisdiction*, p. 126, the reason of the American rule that a judgment rendered during vacation is void is pointed out. It is the result of express statutes that the jurisdiction of the court should be exercised during term time. There is no English authority in support of the appellant's position. In England no doubt Sunday is a *dies non* under the common law and all judicial work on that day is prohibited by statute. See BROOM'S *Commentaries*, page 15. The Sunday Observances Act of 1676, also provided that no writ, process, warrant, order, judgment or decree shall be served or executed upon the Lord's Day. The English rule with regard to Sundays, it has been held, has no application to India—see *Param Shook Doss* v. *Rasheed Ood Dowlah Bahadur*[1]. In *Bennet* v. *Potter*[2] Lord *Lyndhurst* held that there was no objection to the doing of judicial work on other holidays. In that case the time for pleading expired on a holiday, at 6 o'clock in the evening, which day the plaintiff opened the offices and signed judgment for warrant of a plea. At 8 o'clock the plea was delivered. Application was made to set aside the judgment for irregularity, contending that the plaintiff had no right to open the office for the purpose of signing judgment. But the learned Lord observed : "The office may be opened at any time; it is closed on a holiday for

1. (1874) 7 M. H. C. 285.

2. 2 C. and J. 622.

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the benefit of the officers and they may attend if they think fit so to do." In *Gobind Kumar Chowdhry* v. *Hara Gopal Nag*[1], and *Ununto Ram Chaterjee* v. *Protab Chunder Shiromonee*[2] it was held that the registration of a plaint on a Sunday or other holiday was not illegal. In *Bisram Mahto* v. *Saheb-un-nissa*[3] it was held that a sale of property in execution on a close holiday was not illegal. In *Ram Das Chukkerbutt* v. *The Official Liquidator, Cotton Ginning Company, Limited, Cawnpore*[4] the question was considered at length by Sir *John Edge* C.J. and *Oldfield* J. There, objection was raised to proceedings in the winding up of a company and settling the list of contributaries being held during the long vacation but it was overruled. The learned Judges say with reference to S. 17 of the Bengal Civil Courts Act: "This section, it appears to us, was framed in the interest of the judges and officials of the courts and probably also in that of the Hindu and Mahammadan pleaders, suitors and witnesses whose religious observances might interfere with their attendance in court on particular days * *. The cases which have been decided upon the construction of S. 6 of the 29 Car. II Cap. 7 commonly known as the Lord's Day Act do not in our opinion afford any assistance to us in the present case but the difference between the wording of that section and the section in question in this case is striking. That section provides that no person or persons upon the Lord's Day shall serve or execute or cause to be served or executed any writ, process, warrant, order, judgment or decree (except in cases of treason, felony or breach of the peace) and by that section it is specifically enacted that the service of any such writ, process, warrant, order, judgment, or decree shall be void to all intents and purposes whatsoever. In the section under consideration there are no such specific words as those above quoted. If it had been intended by the legislature that a judge should have no jurisdiction or power to enter upon a judicial proceeding or inquiry on a close holiday and that if the judge did on a close holiday hold a judicial inquiry the proceedings should be void it would have been easy for the legislature to have expressed such intention by the use of apt words such as we find in S. 6 of the Lord's Day Act. "By the

1. (1869) 11 W. R. 537.
2. (1871) 16 W. R. 230.
3. (1880) I.L.R. 3 A. 333.
4. (1887) I.L.R. 9 A. 366.

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rules of Hilary term 6 William IV it was ordered that certain days shall be observed or kept as holidays in the several offices belonging to the said court." With reference to the days mentioned in the rules we find it stated in note 1 at p. 50 of PETERDORFF'S *Abridgement of Common and Statute, Law* Vol. IV, 2nd Edition : "These are not *dies non* but periods of vacation for the courts and offices. The proceedings are not suspended". And again, in the same note, * * * "They are closed on a holiday for the benefit of the officers, and if they think fit to attend they may and if open, judgment may be signed." We are of opinion that on such a close holiday as that in question a judge might properly decline to proceed with any inquiry, trial, or other matter on the civil side of his court and any party to any judicial proceeding, if present, could successfully object to such inquiry being proceeded with, and in the event of any such inquiry having been proceeded with in his absence and without his consent will be entitled to have the proceedings set aside as irregular, probably in any event and certainly if his interests had been prejudiced by such irregularity."

It will be observed in the case of an inquiry all parties would almost necessarily be prejudiced if it goes on in his absence but not so in the case of delivery of a judgment. The learned Judges of the Allahabad Court go on to point out that at best the conduct of the judicial proceedings on a holiday can amount only to an irregularity. Reference has been made at the bar to another case, *Sheoram Tiwari* v. *Thakur Prasad*,[1] where it was held that the decision of a case on a Sunday would at best be only an irregularity and the court contented to agree with the decision in *Param Sheok Doss* v. *Rasheed Ood Dowlah Bahadur* [2] that the Lord's Day Act is not applicable to India at all. S. 15 of Act XII of 1887 (the Bengal, North West Provinces and Assam Civil Courts Act) expressly provides that a judicial act done on a close holiday is not invalid by reason only of its having been done on that day. This is only a legislative recognition of what must be held to be the law on general principles.

We are of opinion that the appellant's objection must be overruled.

We dismiss the second appeal with costs.

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1. (1908) I.L.R. 30 A. 136. 2. (1874) 7 M. H.C. 285.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Ramien .. .. Appellant*
v. (*Plaintiff*)
Veerappudian & others .. .. Respondents
(*Defendants*).

Ramien *v.* Veerappudian.

Evidence Act, S. 90—*Practice—Procedure—Appellate court, powers of —Appeal from preliminary decree after passing of final decree—Competency.*

When *prima facie* evidence of custody and of the date of a document purporting to be thirty years old is given, the court generally re-marks the document on the footing that there is sufficient evidence to justify its being marked as an Exhibit at that stage. It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption under S. 90 of the Evidence Act should not be drawn with respect to the document, and the court generally arrives at its conclusion on the matter after the evidence on both sides has been given.

Where the party was not prejudiced by any ruling on the part of the court or prevented from adducing all the evidence that he could to prove the document or to ask the court to presume its genuineness:

Held: that the appellate court had the same power to decide whether the document should be presumed to be genuine or not as the first court itself.

The right of a party to appeal against a preliminary decree is not affected by the subsequent passing of a final decree.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 624 of 1909 presented against the decree of the Court of the District Munsif of Tanjore in O. S. No. 142 of 1908.

G. S. Ramachandra Aiyar for appellant.

S. Swaminathan for respondents.

The Court delivered the following

JUDGMENT :—Two points are argued in this second appeal. The first point is that as the District Munsif presumed the genuineness of Exhibit A the appellate court had no power in law to hold that it should not be presumed to be genuine and reject it. Reliance is placed in support of this argument on S. 4 of the Evidence Act, which lays down that when the court may presume a fact it may either do so or call for proof of it.

* S. A. No. 1480 of 1910. 2nd January, 1911.

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Ramien *v.* Veerappudian.

The contention apparently is that the appellate court was bound either to hold Exhibit A to be genuine until it was disposed or at least to call for proof. This argument entirely ignores the practice prevailing in the courts of this presidency in the trial of suits. When *prima facie* evidence of custody and of the date of a document purporting to be thirty years old is given the court generally re-marks the document on the footing that there is sufficient evidence to justify its being marked as an Exhibit at that stage. It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption under S. 90 of the Evidence Act should not be drawn with respect to the document. And the court generally arrives at its conclusion on the matter after the evidence on both sides has been given. It is not shown that in this case the District Munsif ever recorded a judicial opinion as to whether he would presume Exhibit A to be genuine before he wrote his judgment in the case. Nor is it urged that the plaintiff asked for a ruling as to whether the Munsif was prepared to presume the document to be genuine, or whether he would require it to be proved. It is, therefore, not correct to say that the plaintiff was prejudiced by any ruling on the part of the District Munsif or prevented from adducing all the evidence that he could to prove the document or to ask the court to presume its genuineness. There is no foundation for the argument that in such circumstances the appellate court has not got the same power to decide whether the document should be presumed to be genuine or not as the court of first instance has. The plaintiff could not require an opportunity of advancing further evidence unless he was prevented by anything done by the court from adducing all the evidence he could. The cases in *Shafiq-un-nissa* v. *Shaban Alikhan* [1] and *Srinatha Patra* v. *Kuloda Prasad Banerjee*,[2] cited for the appellant, do not give him any real support. In the former case the Judicial Committee of the Privy Council merely drew attention to the provisions of S. 90 and S. 4 of the Evidence Act and the second case goes no further. We are of opinion that there is no substance in this contention.

The second point urged is that as the final decree for redemption was passed by the District Munsif before the appeal

1. (1904) I. L. R. 26 A. 581. 2. (1905) 2 C. L. J. 592.

against the preliminary decree was presented in the District Court the appeal was not competent and that the defendant was entitled to appeal against the final decree, or at any rate the appeal against the final decree also. This question has been fully considered by this Court in *Lakshmi* v. *Manidevi* [1] where it was held that the right of a party to appeal against a preliminary decree is not affected by the subsequent passing of a final decree. A later decision of the Calcutta High Court has now been brought to our notice—*Janki Nath Roy Chowdhry* v. *Promoth Nath Roy Chowdhry.*[2] But this case does not carry the question further than the previous decisions already considered in the Madras case and we see no reason to depart from the view adopted in *Lakshmi* v. *Manidevi*[1]. This contention must be overruled.

Ramien *v.* Veerappudian.

In the result the second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Phillips.

P. B. Vedachella Mudaliar & another .. Appellants* (*Plaintiffs*)

v.

Vijayaraghavachariar & others .. Respondents (*Defendants*).

Madras Acts—Land Estates Act, S. 77—"Arrear" includes interest.

The word "arrear" includes also the interest due on the rent in arrear.

Vedachella Mudaliar *v.* Vijayaraghava Chariar.

Second appeals from the decrees of the District Court of Chingleput in A. S. Nos. 360, 362, 367, 368, 370 and 37, to 379 of 1900 respectively presented against the decree of the Sub-Collector of Chingleput in S. S. Nos. 132, 134, 17, 25, 482 145, 14, 16, 24, 36, 42, 46, and 131 of 1909.

R. Subramania Aiyar for appellants.

C. V. Anantakrishna Aiyar for respondent.

The Court delivered the following

JUDGMENT :—In this case the Sub-Collector and the District Judge concurred in holding that a suit for interest on arrears

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* S. A. Nos. 444 to 456 of 1910. 20th September 1911.

1. (1911) I. L. R. 21 M. L. J. 1063.

2. (1911) 15 C. W. N. 830.

Vedachella Mudaliar v. Vijayaraghava Chariar.

of rent is not cognisable by the Revenue courts under the provisions of Madras Act 1 of 1908. The definitions of 'rent' and of 'arrears' in the Act no doubt *prima facie* support that view, rent being defined in S. 3 as "whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land in his estate for the purpose of agriculture" and arrear being defined in S. 60 as "instalment of rent not paid on the day on which it falls due." S. 61 then enacts that "an arrear shall bear simple interest at the rate of one half per centum per mensem for the days on which the arrear fell due until it is liquidated." S. 77, Clause (1), lays down that at any time after an arrear of rent has become due the landholder may institute a suit before the Collector for the recovery of the arrear." It does not say of a suit for "arrear and interest" though Ss. 60 and 61 taken together would *prima facie* tend to show that the word "arrear" does not of itself include interest. Clause 2 of S. 77, in stating what other remedy is open to the landholder for the realisation of arrears, says that he may distrain the moveable property of the ryot. It is clear from S. 78 that the landholder is entitled to distrain unless both the arrear and interest, which it says he is entitled to include in his demand, are paid. This is made clearer by S. 127 which refers to the sale of the immoveable property for arrears of rent and interest. On going carefully through the sections of the Act, we cannot but come to the conclusion that the word "arrear" was intended to include also the interest due on it—see Ss. 78 (*a*), 87, 112 and 122. We can see no reason for supposing that the Legislature intended to give jurisdiction to the Revenue courts exclusively to try suits for arrears of rent and to exclude from their jurisdiction claims to interest and arrears. *Prima facie* Revenue courts were regarded as best fitted to try claims for rent between landholders and ryots. Although the language of the sections is by no means as clear as might be desired, we are satisfied that the intention clearly was to include interest in the expression "arrear" in S. 77 and in the corresponding provision in Schedule A. The decrees of the lower courts must, therefore, be reversed and the suit remanded to the Sub-Collector for disposal on the merits. Each party will bear his own costs throughout up to date.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Nechooli Parie Amma .. *Appellant* *
v. (*Plaintiff*)
Chathanadath Kalassin Kunhikandan *alias*
Moothoran and others .. *Respondents*
(*Defendants*).

Parie Amma *v.* Moothoran.

Madras Acts—Malabar Tenants Improvements Act, S. 19—Kanom—Construction of covenant.

Contracts prior to January 1886 limiting the right to make improvements, are not affected by S. 19 of the Malabar Tenants Improvements Act. It may be that S. 19 did not intend to pronounce any agreements between the Jenmi and his Kanomdar as to what should be regarded as improvements suitable to the holding invalid.

A Kanom deed had in it the following clause: "If I make Chamayams thereon exceeding Rs. 25 in value I shall only remove and take them at the time of surrender and shall not demand the value of improvements therefor." *Held* that the object was not to restrain the Kanomdar from building but to restrict his right to compensation if he built and that the Kanomdar was entitled to the rate prescribed by the Act. [*Koshikot Pudia Kovilagath Sree Manavikraman* alias *Cheriyah Rajah Avergal* v. *Chundayil Madathil Ananta Pattar* [1] followed.]

Second appeal from the decree of the Subordinate Judge's Court of Calicut in A. S. No. 660 of 1909 presented against the decree of the Court of the Principal District Munsif of Calicut in O. S. No. 586 of 1908.

J. L. Rosario for appellant.

P. Kundu Paniker and *C. V. Anantakrishna Aiyar* for respondents.

The Court delivered the following

JUDGMENT.—The question raised in this case is whether the defendants holding the lands sought to be recovered in the suit on a kanom executed in the year 1884, are disentitled under the terms of the kanom instrument, Exhibit A, to recover compensation for chamayams or buildings worth more than Rs. 25. The first defendant is the purchaser in court auction of the kanom right. The second defendant is a sub-mortgagee under the original kanomdar holding under a document executed

* S. A. No. 540 of 1910. 9th November, 1911.

1. (1910) I.L.R. 34 M. 61.

Parie Amma v. Moothoran

by him before the date of Exhibit A (Exhibit A being the renewal of an earlier kanom). The 6th defendant is found by the lower appellate court to have constructed his buildings worth more than Rs. 25 about the year 1883. The 13th and 14th defendants who also raised buildings worth more than Rs. 25 obtained an assignment of a portion of the lands included in the kanom in 1907, shortly before the suit. The lower courts held that the defendants mentioned above were not bound by the terms of Exhibit A which they held would disentitle them to claim a larger compensation than Rs. 25. The grounds on which this finding is based are:—

(1) That Exhibit B, the melcharth executed in favour of the plaintiff, authorised him to pay the value of buildings erected by the prior holders without any limitation.

(2) That the jenmi, 17th defendant, in bringing to sale the rights of the original kamomdar under Exhibit A described them as "the kanom Kushikur and Chamayam and all other rights thereon" over the property in question possessed by the kanomdar.

(3) That the 1st defendant who before his purchase of the kanom took the mortgage, Exhibit III, in 1887 from the original kanomdar had no notice of any restriction contained in the kanom document of the kanomdar's rights to compensation for buildings.

We are of opinion that none of these grounds support the conclusion arrived at by the lower courts. Exhibit III states that the kanom document, *i. e.*, Exhibit A, was handed over to the mortgagee who must therefore be held to have had full notice, of the provisions of Exhibit A. The sale certificate, Exhibit I cannot be held to confer on the 1st defendant anything more than the rights which the judgment-debtor, whose rights he purchased, actually possessed. The provision in Exhibit B authorising the plaintiff to pay the value of chamayams to which the kanomdar might be entitled, could not enhance the rights possessed by the kanomdar under his own title deed. Mr. Anantakrishnier, for the respondents, however, seeks to support the judgment of the lower courts on the ground that the provision in Exhibit A restricting the kanomdar's right to make

chamayams and recover compensation for them, is not enforceable on account of the provisions of the Malabar Tenants Improvements Act, I of 1900. In *Koshikot Pudia Kovilagath Sree Manavikraman* alias *Cheriyah Rajah Avergal* v. *Chundayil Madathil Ananta Pattar*[1] this court held that under the provisions of that Act a tenant is entitled to the full value of his improvements according to the rates provided in Ss. 9 to 15, and that S. 19 does not cut down his right under Ss. 2 and 6 to the value of his improvements according to the rates prescribed in the Act even where a contract was entered into before the 1st January 1886, limiting his right with respect to the amount of compensation claimable by him. We adopt the law as laid down in that judgment, and if Exhibit A can be rightly held to have merely limited the amount of compensation to which the kanomdar was entitled for buildings, we are of opinion that the restrictive provision in that document cannot be enforced. Mr. Rosario, for the appellant, contends that the document really goes further and restricts the kanomdar's right to erect buildings at all, if they are worth more than Rs. 25, and argues that S. 19 of the Act does not render such a contract entered into before the 1st of January 1886, invalid. The respondent contends that under Ss. 5 and 6 the kanomdar is absolutely entitled to the value of all improvements, and that S. 19 which does not expressly provide that a contract before the 1st January 1886, restricting the right to make improvements is valid, cannot be taken to modify the provisions of Ss. 5 and 6. We are unable to uphold this argument. We are bound to construe the Act so as to give some effect to every section of it. On the construction contended for by Mr. Anantakrishnier S. 19 would be unnecessary and if we are to regard it as enacted *ex abundanti cautela*, as suggested by him, then the words "after the 1st day of January 1886" qualifying the contracts referred to in the section would be unnecessary if his construction be maintained. We are bound to hold that contracts prior to January 1886, limiting the right to make improvements, are not affected by the section. It may be that S. 19 did not intend to pronounce any agreements between a jenmi and his kanomdar as to what should be regarded as improvements

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1. (1910) I.L.R. 34 M. 61.

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suitable to the holding, invalid. The question then that we have to decide is, what is the true nature of the provision in Exhibit A with regard to buildings to be erected by the kanomdar? The provision is in these terms: "If I make chamayams thereon exceeding Rs. 25 in value, I shall only remove and take them at the time of surrender and shall not demand the value of improvements therefor." The meaning of the agreement, in our opinion, is that the tenant's only right with respect to buildings of more than Rs. 25 in value which he might erect is to remove them and that he is not entitled to demand their value. The provision for removing is merely a recognition of the right which a kanomdar has always possessed to remove any improvements made by him. See *Angammal* v. *Aslami Sahib*[1]. We are of opinion that the agreement that he should not demand the value of buildings worth more than Rs. 25 means nothing more than that he should not demand more than Rs. 25 for any buildings erected by him. We do not think that it was intended that if the tenant was content with Rs. 25 for a building worth more than that amount, the landlord should be entitled to refuse to pay him anything for it. The object of the clause appears to be to provide a limitation on the amount which the tenant was entitled to claim for improvements and not to prevent him from constructing any buildings worth more than Rs. 25 at all. No right is given to the jenmi to require the removal of buildings worth more than Rs. 25 and to restore the land to its condition before the erection of the building. In other words, the object was not to restrain the kanomdar from building but to restrict his right to compensation if he built. The agreement was therefore one regulating and restricting the amount of compensation to which the kanomdar was entitled for buildings erected by him. The decision in *Cheriya Rajah* v. *Ananta Pattar*[2] is therefore applicable to the case. We uphold the judgment of the lower appellate court on this ground and dismiss the second appeal but in the circumstances without costs.

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1. (1909) 21 M.L.J. 891.

2. (1910) I.L.R. 34 M. 61.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Tej Mal Sowcar .. Appellant* (*Defendant*)

v.

Jagapilla Papayamma and others .. Respondents (*Plaintiffs*).

Tej Mall *v.* Papayamma.

C. P. C., S. 99—Applicability to appeals heard after the new Code but filed before the Code came into force—Misjoinder—Practice—Procedure—Second appeal—Court, function of—Limitation Act, Art. 11—Claim suit.

S. 99 of the new Code is applicable to all appeals heard after the new Code came into force though instituted before the Act.

When the appellate court, overruling a plea of misjoinder, passes a decree on the merits of a case, the second appellate court should not reverse the decision on the ground of misjoinder.

Where an order on a claim petition has become final as against one of several claimants, a court is not competent to pass a decree setting aside the order against the said party in a suit by the other claimants.

Second appeal from the decree of the Temporary Subordinate Judge's Court of Vizagapatam in A. S. No. 214 of 1909 presented against the decree of the Court of the District Munsif of Vizagapatam in O. S. No. 223 of 1908.

V. Ramesam for appellant.

S. Srinivasa Aiyangar for respondents.

The Court delivered the following

JUDGMENT:—In this case the 1st and 2nd defendant each obtained a decree for money against the third defendant, and certain property was attached as belonging to the judgment-debtor in execution of each of the decrees. When the attachment was made at the instance of the 1st defendant, plaintiffs Nos. 1 to 3 and the 4th defendant, who are sisters, put in a claim petition urging that the property attached belonged originally to their mother, the 3rd defendant's wife; that they had succeeded as heirs, and that, therefore, 1st defendant had no right to attach it as belonging to the 3rd defendant. No claim petition was put in when the second defendant made the attachment. This suit is instituted by the plaintiffs, three out of four

* S. A. No. 1025 of 1910. 28th November, 1911.

Tej Mall v. Papayamma.

sisters, for a declaration "that the attachments made by 1st and 2nd defendants are not valid" on the ground that the property does not belong to the 3rd defendant.

An issue was raised as to whether the suit was not bad for misjoinder of causes of action on the ground that there was really no cause of action against the 2nd defendant as no claim petition had been put in against his attachments and that at any rate the plaintiffs had not the same cause of action against the first and second defendants. The District Munsif upheld the objection of misjoinder and decided on the merits also against the plaintiffs, holding that the property belonged to the 3rd defendant and not to his wife.

On the appeal preferred by the plaintiffs the Subordinate Judge held that there was no misjoinder of causes of action and, disagreeing with the Munsif on the merits, held that the property belonged to the mother of the plaintiffs and the 4th defendent and passed to them by inheritance, and he passed a decree as prayed for in the plaint. Mr. Ramesam in second appeal argues that the Subordinate Judge was wrong in holding that there was no misjoinder. We have not heard his arguments on this question fully as we have come to the conclusion that even if there was misjoinder we should not interfere with the judgment of the lower appellate court on that ground. Section 99 of the Civil Procedure Code (Act V of 1908) enacts that no decree shall be reversed or substantially varied * * on account of any misjoinder of parties or causes of action. The learned vakil for the appellant contends that this section is not applicable to this case as the suit was instituted while the repealed Procedure Code (Act XIV of 1882) was in force and the corresponding section in that Code, namely, S. 578, did not make any provision similar to that in S. 99 of the new Code in cases of misjoinder of causes of an action. But we are of opinion that the section is one regulating the procedure of the appellate court, and that, therefore, it is applicable to all appeals heard after the Act came into force. The section was held to apply in a similar case—*Aiyavu Mooppan* v. *Vellaya Nadan*[1]. Mr. Ramesam relied on *Venkata Narasimha Appa Row* v. *Lakshmi Venkayamma Row*[2] where he contends that Order XLI, r. 33,

1. (1910) I.L.R. 34 M. 55. 2. (1909) 7 M.L.T. 296.

dealing with the powers of an appellate court in pronouncing judgment, was held not to apply to appeals presented before the new Act came into operation. That was an appeal under S. 15 of the Letters Patent against the judgment of this court, the two Judges who originally heard the appeal differing in opinion. It is not clear whether the learned Judges may not have meant that the procedure in Letters Patent appeals is not governed by Order XLI, r. 33. However that may be, in several subsequent cases it was held that Order XLI, r. 33, would be applicable to all cases where an appeal is heard after Act V of 1909 came into force—in *Krishnier* v. *Sarvothama Royar* [1], in *Nagulla Kottayya* v. *Nagulla Mallayya* [2] (*Abdur Rahim* and *Krishnasawmi Iyer* JJ.) and in *Chandramathi Ammal* v. *Narayanasawmy Iyer*[3]. It may be noted that *Wallis* J. was one of the learned Judges who decided *Venkata Narasimha Appa Row* v. *Lakshmi Venkayamma Row*[2]. Section 99 of the new Code was held applicable in cases of misjoinder though the suit or appeal might be instituted before Act V of 1908. In *Achuthan Unni* v. *Vasunni* [4] it was suggested that S. 99 of the new Code would not apply where the first court dismisses the suit on the ground of misjoinder, but the appellate court, overruling the decision, holds in appeal that there is no misjoinder and pronounces a decision on the merits of the case. But in a case already referred to—*Aiyavu Moopan* v. *Vellayya Nadan* [5]—S. 99 of the new Code was applied to such a case. Besides, when the appellate court, overruling the plea of misjoinder, passes a decree on the merits of the case we think it would be right to say that the court of second appeal should not reverse that decision on the ground of misjoinder of causes of action. The appellate court has to try the suit and has got the same function and the same powers as the court of first instance, subject to any limitations expressly imposed by the legislature. The principle has been held to be applicable to all cases where the appellate court has plenary jurisdiction and not a mere limited jurisdiction as in the case of such appeals. S. 107 of the Civil Procedure Code (Act V of 1908) recognises it, and we believe it has always been recognised both in England and in this

1. (1910) M.W.N. 640.
2. (1909) 7 M.L.T. 296.
3. (1909) I.L.R. 33 M. 241.
4. (1909) 20 M. L. J. 344.
5. (1910) 34 I.L.R. Mad 55.

Tej Mal v. Papayamma.

country in determining the powers of a court of appeal. We are, therefore, of opinon that we should not interfere with the judgment of the Subordinate Judge on the ground of misjoinder.

Mr. Ramesam, in the course of his argument, has raised another point, namely, that as the plaintiffs are at present entitled only to a three-quarter share in the property and as the 4th defendant is entitled to the other one-quarter share and the suit has been instituted by the plaintiffs only, the lower appellate court should not have declared that the attachment by defendants Nos. 1 and 2 of the property in question was altogether invalid. We are of opinion that he is right in contending that no relief ought to have been granted to the plaintiffs except as to their rights. The order on the claim petition became conclusive against the 4th defendant on the expiration of one year from the date that it was passed. We therefore modify the decree of the lower appellate court by directing that the declaration as against the appellant, the 2nd defendant, shall be that the attachment of the property is invalid as against the rights of the plaintiffs in the suit. As the last point was not raised in the grounds of second appeal, we think that the appellant should pay the whole of the respondent's costs in this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Abdur Rahim.

Adusupatti Venkata Rao, Executor to the estate of the deceased Ramanuja Ammal .. Appellant* (*Plaintiff*)

v.

Sawmi Pillai and others ... Respondents (*Defendants*).

Ramanuja Ammal v. Sawmi Pillai.

Succession Act, Ss. 91, 106, 107—Attachment of bequest before administration—Executor not party to attachment proceedings, effect of—Attachment of property not belonging to judgment-debtor—Effect.

A bequest becomes vested in the devisee on the death of the testator, though he may not be entitled to possession except in the proper course of administration; and consequently the same is attachable in execution of a decree against the devisee.

An attachment of a judgment-debtor's property does not become illegal because other properties which did not belong to him have also been included in the attachment.

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* A. A. A. O. Nos. 22 of 1909. 28 November, 1911.

Ramanuja Ammal v. Sawmi Pillai.

The executor of the estate is a proper party to the attachment proceedings, but they are not liable to be set aside on the ground of his not having been made a party, especially when the objection was not taken at the time when it could have been remedied and the administration was over at the time when the objection was actually taken.

Appeal from the order of the District Court of Chingleput in A. S. No. 225 of 1907 presented against the order of the Court of the District Munsif, Poonamalle, in E. P. No. 774 of 1906 (O. S. No. 161 of 1894 on the file of the City Civil Court, Madras, and C. M. P. Nos. 849 and 852 of 1906.)

Joseph Satya Nadar for appellant.

T. R. Krishnasami Aiyar for *T. R. Ramachandra Aiyar* and *T. M. Srinivasa Aiyengar* for respondents.

The Court delivered the following

JUDGMENT:—The District Judge is wrong in holding that because the Administrator General who had obtained probate of the will of the deceased father of David Pillai, the judgment debtor, was not a party to the Execution Petition under which attachment was ordered in September 1900 the attachment must be treated as illegal and cannot form the basis of a sale. The attachment, as we understand, was of the interest of David Pillai in the lands of the testator situated in a particular locality on the supposition that David Pillai was solely entitled to those lands including the property in dispute. Subsequent thereto the estate has been divided among the different devisees and legatees, the property now sought to be sold falling to the share of David Pillai. That being so, it is difficult to see why the attachment, which still subsists, should be regarded as of no avail with respect to property that fell to the share of David Pillai. It does not seem to us to be reasonable to hold the attachment of a judgment-debtor's property to be illegal because property which did not in fact belong to the judgment-debtor has also been included in the attachment. Nor do we think there is force in the argument of the lower courts that, because the estate of the judgment-debtor's father was in the hands of the Administrator-General, the judgment-debtor had no interest in the bequest which he receives under his father's will on the date of attachment. A bequest, unless the testator intended otherwise, as in the case of a contingent bequest, becomes vested in interest in the devisee or legatee from the date of the testator's death although he may

Ramanuja Ammal v. Sawmi Pillai.

not be entitled to receive what has been bequeathed to him except in due course of administration. This, we may point out is clear from the provisions of Ss. 91, 106 and 107 of the Indian Succession Act upon general principles relating to construction of wills. See JARMAN on *Wills*, Vol. II, p. 1357. In this connection we may observe that there is a dictum in *Sriranga-ammal* v. *Sendammal*[1], referred to by both the courts, which is apparently construed to mean that in cases under the Indian Succession Act the heir of a deceased person has no saleable interest in the heritage until an administrator has distributed the estate in due course of administration. The language used by the learned Judges in that case, which is rather vague, is perhaps capable of this construction, but we do not think that is what was meant; for we do not know of any provision in the Indian Succession Act which contemplates any such result. An heir or a legatee may not be entitled to possession of what he inherits or is bequeathed to him except in the proper course of administration, but that does not mean that he acquires no interest till then. Perhaps all that the learned Judges in that case intended to lay down was that an heir under the Indian Succession Act has no right to any specific property belonging to the estate until it has been allotted to him in the course of administration. Then there is another fact relied on by the lower courts in support of the view that the attachment of September 1900 was void, *viz.*, that the Administrator-General was not a party to the execution petition on which the attachment was ordered. No doubt he ought to have been made a party to the application, but the omission, it seems to us, cannot form a valid ground of objection to the present application on the part of the judgment-debtor. No objection was taken to the attachment at the time it was made on that ground; if it had been taken the defect could have been remedied in time. The estate of the judgment-debtor's father has now, as we understand, been fully administered and the Administrator General has nothing further to do with the estate, and as the attachment still subsists the application for sale must be regarded as in order. We may mention that, apart from the *dictum* already referred to, the decision in the case reported in *Srirangammal* v. *Sendammal* [1] has no application to the present

1. (1900) I. L. R. 23 M. 216.

case. In *Srirangammal* v. *Sendammal* [1] what was decided was, that a suit for partition by the assignee of the devisees under the will would not lie until the estate has been administered. *Bhalji Bhimji* v. *Administrator-General of Bombay*[2] is also distinguishable from the present case. There a decree was obtained against a person as the heir and legal representative of the devisee's estate while the estate had become vested in the Administrator-General. The Administrator-General was not a party to the suit, and it was in execution of that decree that the estate of the deceased was attached without notice to the Administrator-General. It was held that neither the decree nor the attachment was binding upon the Administrator-General, but no such question arises in the present case as the estate has been fully administered and the decree against David Pillai was in his individual capacity and not as legal representative of his father. It appears, however, that the respondents Nos. 2, 3 and 5 perferred a claim to some of the properties sought to be sold and that that claim has been allowed.

The result, therefore, will be that the appeal will be allowed with costs as against the 1st respondent and dismissed with costs as against respondents 2, 3, and 5 and the Execution Petition No. 774 of 1906 will be remitted to the District Munsif for disposal according to law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

S. A. Anantanarayana Iyer and others .. Appellants* (*Defendants*).

v.

Savithri Ammal .. Respondent (*Plaintiff*).

Ananta narayana Iyer v. Savithri Ammal.

C. P. C. (Act XIV of 1882) S. 43—Stipulation in partition deed—Pronote—Partition suit and suit on pronote—Hindu law—Allotment for marriage.

Some Hindu brothers entered into a partition. One of them made a claim for an allotment for the approximate marriage expenses of his unmarried daughters. The other brothers in settlement thereof agreed

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* S.A. No. 943 of 1910. 14th December 1911.

1. (1900) I. L. R. 23 M. 216.

2. (1898) I. L. R. 23 Bom. 428.

Ananta-narayana Iyer v. Savithri Ammal.

to pay in the partition *karar* a certain sum and two of the brothers executed pronotes subsequently for distinct sums amounting in the aggregate to the agreed amount.

Held :—That a suit on one the pronotes was not barred by a previous suit for partition under S. 43 C.P.C. (XIV of 1882).

Quaere :—There is nothing to warrant the assumption that a claim by one of several co-parceners for a separate allotment for the marriage expenses of his daughters out of the family funds was not warranted by the Hindu law.

Where a pronote is executed in respect of an existing obligation, two causes of action are given rise to, one on the obligation and the other on the pronote, on either of which a suit may be maintained. The presumption would ordinarily be that the cause of action for the debt is merged in the pronote. But there would be no effective legal merger when the pronote cannot be sued on.

Second appeal from the decree of the District Court of Tanjore in A. S. No 392 of 1909 presented against the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 5 of 1905.

T. Rangachariar and *V. Purushothama Aiyar*, for appellant, submitted that the cause of action on the pro-note and the partition arrangement was one, and therefore the previous action on the partition arrangement precluded the present action on the pro-note. It might have been otherwise if the note had changed hands. He cited *Appasami* v. *Ramasami*[1]; *Shunmugam Pillai* v. *Syed Gulam Ghose*[2]; *Preonath Mukherji* v. *Bishanath Persad*[3]; *Umed Dholchand* v. *Pir Saheb Jiva Miya*[4].

T. R. Venkatrama Sastri for the respondent cited *Sesha Aiyar* v. *Krishna Aiyangar*[5].

The Court delivered the following

JUDGMENT:—The suit out of which this second appeal arises was instituted on a pro-note executed in favour of the plaintiff's husband by the first defendant on behalf of himself and as guardian of the second defendant, who is his natural son given away in adoption to a brother of his. There were four brothers in an undivided Hindu family, namely, the plaintiff's husband Aiyasawmi Iyer, the first defendant, the second defendant's adoptive father and one Subramania Iyer. Disputes arose between them in connection with the partition of their

1. (1886) I. L. R. 9 M. 279.
2. (1903) I. L. R. 27 M. 116.
3. (1906) I. L. R. 29 A. 256.
4. (1886) I. L. R. 7 B. 134.
5. (1900) I.L.R. 24 M. 96.

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family property. Aiyasawmi Iyer, the plaintiff's husband, was burdened with 6 daughters, only two of whom had been given away in marriage. Several daughters of some of the other brothers had been married at the expense of the family. Aiyasawmi Iyer made a claim that he was entitled to have an allotment towards the expenses of the marriage of his other daughters. The other brothers in settlement of this claim agreed to pay him Rs. 5,000. This agreement is one of the stipulations contained in the partition Karar (Exhibit C) dated the 5th September 1901. According to Exhibit C they were bound to make the payment within three months, by which time apparently the parties intended the partition would be completed. Lists of properties to be allotted to each of the co-parceners were drawn up on the 11th January 1902. As payment of the Rs. 5,000 promised had not been made to the plaintiff, two pro-notes were executed for the amount—one of them (Exhibit A) for Rs. 3,333 5-4, and the other, by Subramania Iyer, for the balance, on 10th January 1902. The lower courts have held the plaintiff entitled to a decree for the amount due on the pro-note (Exhibit A). The defendants object to the decree on three grounds : (1) that there was no consideration in law for the promise to pay Rs. 5,000 ; (2) that the promise was not of such a character as would be binding on the minor second defendant when made by his guardian the 1st defendant, and (3) that the suit is barred by S. 43, C. P. C.

The first contention may be disposed of in a few words. The appellant's argument is the agreement to pay Rs. 5,000 was not one of the terms of the agreement between the parties for the division of the family properties but an independent promise; that there was no obligation under the Hindu law on Aiyasawmi's brothers to contribute towards the expenses of his daughters' marriage and that there was therefore no legal consideration to support the promise. We are entirely unable to accede to this argument. Paragraph 13 of Exhibit C says: "As it has been settled that for the expenses of marriage, etc., that have to be celebrated for the daughters of Aiyasawmi Iyer one of us the other three co-parceners shall pay Rs. 5,000 in a term of three months from now, the said sum of Rs. 5,000 shall be accordingly paid off in the aforesaid term." The natural

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construction of the clause is that the parties agree under the instrument, Exhibit C, to pay the sum, but assuming that it had been previously settled that Rs. 5,000 should be paid to Aiyasawmi Iyer that fact would certainly make no difference for the effect of the clause is to make the previous agreement about the payment of Rs. 5,000 part of the agreement of partition which the parties were at perfect liberty to do. Mr. Rangachari attempted to perform the impossible feat of separating the promise contained in clause 13 from the other terms of Exhibit C and he would regard the statement in paragraph 13 as a mere recital of an independent promise even if the promise was made at the same time as the other terms in Exhibit C were agreed to. He contends that the plaintiff himself so treated the matter in the plaint, but we can find nothing in the plaint to support the argument. He also relies on a sentence in Exhibit B, a letter written by the first defendant and Subramania Iyer on the same day as they executed the pro-notes, in which they say: "Even though other matters relating to partition among us may not be settled, we shall pay off the said amount without raising any objection." But this does not show that the pro-note was a transaction independent of the agreement of partition. The object of the latter was merely to prevent the executants of the property, in case litigation should ensue with regard to the enforcement of the agreement of partition, from resisting the payment of the amount of the pro-notes until the other terms of the partition agreement were also fulfilled by the various parties thereto. In other words, the object was to prevent them from raising the plea that no term of Exhibit C could be enforced prior to the fulfilment of the other terms. This does not show that the promise was not to be enforced as one of the terms of Exhibit C. It is not contended that the defence of absence of consideration could be set up if the promise be regarded as one of the terms of the contract of partition as Aiyasawmy Iyer's agreement to the other terms of the contract would then be sufficient consideration.

With regard to the second contention that the first defendant had no right to bind the minor second defendant by such a promise, the argument is that, according to Hindu law, there is

no obligation on the part of co-parceners to provide at a partition for the marriages of the daughters of one of them out of the general family funds, and that it was therefore beyond the powers of the first defendant, as a guardian, to bind his ward for a purpose which created no legal obligation on the ward. But it is clear that Aiyasawmi made a claim that he was legally entitled to a provision for his daughters' marriages. Three daughters of the 1st defendant had been married at the expense of the family estate and the only daughter of Subramania Iyer had been married and provided for out of joint family funds. There is no reason for supposing that Aiyasawmi Iyer did not believe that he had ground for making the claim or that the 1st defendant did not believe that there was some ground for the claim. Nor can we assume that the claim was altogether unfounded according to Hindu law although the plaintiff's pleader in the court of first instance seems to have conceded that the claim could not be enforced by a court of law. Further it appears from paragraph 12 of the Subordinate Judge's judgment that there were other matters in dispute between Aiyasawmi Iyer and his brothers. All of them were settled by Exhibit C, and it is impossible to separate the promise contained in paragraph 13 from the other terms of exhibit C and to question its validity by a consideration merely of the abstract legal question which is raised to resist the promise. We must uphold it as one of the terms of a *bona fide* compromise constituting a settlement between the members of the family.

We now proceed to the consideration of the last question, whether the suit is barred by S. 43 of Act XIV of 1882. The defendant's contention is that the plaintiff should have included the present claim in the suit No. 31 of 1904, on the file of the Additional Subordinate Court of Tanjore instituted by the plaintiff's husband against the defendants and Subramania Iyer for division of the family properties. The learned vakil for the appellants contends that the cause of action was the same in both suits, namely, agreement of partition, Exhibit C, and that the suit is therefore barred by S. 43. The argument is fallacious for several reasons. In the first place the present claim is one against the 1st and 2nd defendants only while the right to division of the properties was against all the members of the

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family including Subramania Iyer—see *Nannu* v. *Raman* [1] and 1890 Punjab Reports, 32. Secondly, the parties agreed to execute separate pro-notes for the sum of Rs. 5,000, Exhibit A being executed by defendants Nos. 1 and 2 and another pro-note by Subramania Iyer for the remainder of the amount. The original agreement to pay Rs. 5,000 was thus split up into two contracts. In Exhibit B, the letter already referred to, the first defendant and Subramania Iyer say: "As we have not found it convenient to settle it now" (that is the payment of Rs. 5,000) "according to the aforesaid arrangement" (that is to pay the amount within three months from the date of Exhibit C) "we have on this date separately executed promissory notes to you for the said amount and thereby the said matter has been settled." In other words the obligation created by Exhibit C is regarded as discharged by the execution of two different pro-notes. There can, therefore, be no doubt that the promise contained in paragraph 13 of Exhibit C became separated from the other obligations contained in that instrument and was split up into two different obligations by two pro-notes. Each pro-note, therefore, furnishes a separate cause of action different from the obligation existing under Exhibit C. Thirdly, even apart from the effect of Exhibit B, we have no doubt that although the original obligation may be single and entire, if the parties agree to execute a separate document for a part of the obligation, that document will constitute a distinct cause of action.

In *Sesha Iyer* v. *Krishna Iyengar* [2] a sum of Rs. 10,500 was found due by a debtor and for this amount two mortgage bonds were executed by him, one for Rs. 10,000 and the other for Rs. 500 on the same date. It was contended that a suit instituted on the bond for Rs. 10,000 was barred by a previous suit on the one for Rs. 500. *Shephard* and *Davies* JJ. held that it was not. The learned Judges say: "It may be true that the term 'cause of action' is used in that section in a peculiar way, but we do not think that when parties for whatever reason choose to agree that there should be two instruments and two obligations the courts are justified in saying that there is only one obligation." The same view was held in *Umad Dholchand* v. *Pir Saheb Jiva Miya* [3]. There for the amount due on a previous bond two

1. (1892) I.L.R. 16 M. 335.
2. (1900) I.L.R. 24 M. 96.
3. (1883) I.L.R. 7 B. 134.

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different bonds were executed by the debtor. *Sargent* C. J. and *Melville* J. held that the bonds furnished different causes of action for the purposes of S. 43. Their Lordships say: "There can be no doubt that the two bonds and the default in payment of them constitute, in any way of the expression, 'cause of auction', two distinct causes of action and there is nothing, we think, in the language of the section(which would appear to have been mainly designed to discourage multiplicity of suits) which would justify the court in going behind the bonds to consider the circumstances out of which they sprung, albeit those circumstances might themselves at the time have constituted a cause of action." See also *Sundara Singh* v. *Bholu*[1] and *Moro Raghunath* v. *Balaji Trimbak*[2]. It is immaterial as pointed out by the Bombay High Court for the decision of an objection under S. 43 to consider whether the suit could have been instituted on the original indebtedness apart from the pro-notes. It is often the case, no doubt, where a pro-note is executed for a previously existing debt that an action may be maintained on the debt apart from the pro-note. And it is sometimes necessary to do so, when the pro-note is unenforceable for defect of stamps, or otherwise. But this does not show that the pro-note itself is not a cause of action. There are two causes of action in such a case, on either of which a suit may be mantained. The presumption wouldordinarily be that the cause of action for the debt is merged in the pro-note. But there would be no effective legal merger where the pro-note cannot be sued on. If several pro-notes are executed for portions of the same debt each pro-note creates a cause of action and this would be so even if it is assumed that a suit might be instituted for the whole debt on the original cause of action. If the creditor, neglecting one of the pro-notes, institutes a suit for the amount secured by it on the original cause of action, then no doubt he would not be entitled to maintain another suit for the remaining amount on the original debt. In such a case he could claim no more than the amount secured by the particular pro-note. That pro-note is not a cause of action on which he could claim the value of the debt. S. 43 compels a person only to include the whole of the claim arising from the same cause of action. It does not require him to include what he could claim on the

1. (1898) I.L.R. 20 A. 322.

2. (1888) I.L.R. 13 B. 45.

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cause of action distinct from that which he sues on. Mr. Rangachari has referred to three cases in support of his contention—*Appasawmi* v. *Ramasawmi*[1], *Shanmugam Pillai* v. *Syed Ghulam Ghose*[2] and *Preonath Mookerjee* v. *Bishnath Prasad*[3]. In the first of these, *Appasawmi* v. *Ramasawmi*[1], upon a settlement of accounts a sum of money was found due to a creditor upon which the debtor agreed to pay. He gave the creditor an order on his agent to pay a portion of this amount from the profits of certain lands and promised to pay the balance within a month. The agent having failed to make payment two different suits were instituted on the same day against the debtor for the amount which he had directed the agent to pay and for the balance respectively. It was contended that both suits were barred by Ss. 42 and 43. *Brandt* and *Parker* JJ. held that the giving of the order on the agent was not similar to the execution of a pro-note so as to give the creditor a separate cause of action for the amount of the order and that the cause of action for the whole amount remained the same. They distinguished *Umed Dholchand* v. *Pir Saheb Jiva Miya*[4] and held that one of the suits must be held to be barred. That case is clearly not analogous to the present one where a distinct source of obligation was created by the execution of the pro-note. In the second case *Shanmuga Pillai* v. *Syed Ghulam Ghose*[2] an inamdar obtained separate muchilikas from the occupying ryot of his land for two different years. He first instituted a suit for rent for the later year and subsequently instituted another for the rent of the earlier year. *Benson* and *Bashyam Iyengar* JJ. held that the second suit was barred. The judgment was based on the ground that the muchilikas did not furnish the cause of action for rent. They apparently regarded a muchilika as merely evidence of the terms of the tenancy between the landholder and the ryot. They observe: "Though there were separate muchilikas for faslis 1306 and 1305 yet there was but one cause of action, namely, non-payment of rent by a tenant to his landlord. Though the rents became payable under different documents and at different times, they are only different claims under the same cause of action or tenancy. The case is very

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1. (1886) I.L.R. 9 M. 279.
2. (1903) I L.R. 27 M. 116.
3. (1906) I.L.R. 29 All 256.
4. (1883) I.L.R. 7 B. 134.

similar to the case where several articles are sold in succession by *A* to *B*. It the vendor sues for the price, he must sue for the price of all the goods sold up to the date of his suit, and cannot sue separately first for one and then for another." In *Preonath Mookerjee* v. *Bishnath Parsad* [1] "*A*, a doctor, agreed with *B*, to accompany *B* to Hardwar, as his medical attendant on a fee of Rs. 100 a day. After 7 days *B* gave *A* promissory note for Rs. 700 representing 7 days' fees. *B* who was a vakil also promised to assist *A* professionally in certain litigation. *B* however, died before he could fulfil his agreement to render professional services: *A* sued *B's* son on the promissory note, first and subsequently brought a separate suit for the balance of his fees for attendance at Hardwar under the alleged agreement and for fees for later attendance at Benares." It was held that the second suit was barred by the provisions of S. 43 of the Civil Procedure Code so far as the fees for attendance at Hardwar were concerned though not in respect of the other fees claimed. The learned judges *Stanley* C.J. and *Burkitt* J. say that the cause of action for medical fees was the same in both cases and that it was in reality the breach of the agreement to pay a fee of Rs. 100 per day for attendance on the deceased. They observed: "It is true Raghunath Prasad executed a promissory note to secure the payment of Rs. 700 on account of fees for 7 days but the fact that this security was given does not take the case out of S. 43 because of the proviso to that section which is in the following terms: "For the purposes of this section an obligation and a collateral security for its performance shall be deemed to constitute but one cause of action. The contention, therefore, that the cause of action on the promissory note is one cause of action and the cause of action for the recovery of the balance of Rs. 600 forms another cause of action is not well founded." With all deference we are unable to agree with the learned Judges that a pro-note executed for payment of a debt is ordinarily to be regarded merely as a collateral security for the debt. The deposit of title deeds or mortgage as security is only an accessory right to secure the rendering of the main right, namely, the debt. But the promissory note is *prima facie* to be regarded as the record intended by the parties of the obligation to pay the debt. The decision is not in accordance with the cases already

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1. (1906) I.L.R 29 A. 256.

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referred to above including the judgment of the Allahabad High Court (*Sundra Singh* v. *Bhalu* [1]) which is not referred to in the judgment.

For the reasons mentioned above, we hold that the present suit is not barred by S. 43 of the Civil Procedure code.

We dismiss the second appeal with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Muhammad Umar Khan and another .. Appellants*

v.

Muhammad Niaz-ud-din Khan .. Respondent.

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Limitation Act, Arts. 118, 119, 141—*Suit for possession of property—Custom—Sheikh Ansaris—Gift of father's estate to daughter—Estate taken in.*

Omission to bring a suit for declaration that an alleged adoption of defendant was invalid or never in fact took place is no bar to a suit for possession of property from defendant. [*Thakur Tirbhuvan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* [2] referred to.]

Neither evidence as to the limited rights by custom of a widow in her deceased husband's property nor evidence that a Mahomedan father had been prevented by some local custom from giving the bulk of the property to one of his sons is evidence of the custom alleged in the case that, among the Sheikh Ansaris of the Punjab Mahomedans, a female takes only a life interest in the ancestral property which has come to her by gift from her sonless father and had on the property no power of alienation beyond her lifetime.

Held: Also that the alleged custom was disproved in the case.

Appeal from a judgment and decree of the Chief Court of the Punjab (April 18, 1906) reversing a judgment and decree of the Court of the District Judge, Jullundur (January 13, 1902).

The Judgment of their Lordships was delivered by

Sir John Edge:—This is an appeal from the decree of the Chief Court of the Punjab, dated the 18th of April 1906, reversing the decree of the District Judge of Jullundur, dated the 13th January 1902, which had decreed the plaintiffs' claim.

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* 14th December, 1911.

1. (1898) I.L.R. 20 A. 322.
2. (1906) I.L.R. 28 A. 727 P.C.

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The plaintiffs brought this suit on the 11th of May, 1900, to obtain possession of certain immovable property, lands and houses, in Basti Danishmandan, in the Punjab, which they claimed as their ancestral property. In their plaint they alleged that the property in question had been held, for her life, by Mussammat Zainab, by virtue of a gift made to her by her father Sarfraz Khan, an uncle of the plaintiffs, and that on her death on the 4th May 1899 the right of inheritance in the property devolved upon them as reversionary heirs. They also alleged in their plaint that Mussammat Zainab had not, in fact, transferred the property to the defendant, and that if she had transferred the property to him such transfer was, by law, according to the custom of the tribe to which the parties belong, and the Riwaj-i-Am, *null* and *void* as against the plaintiffs as reversionary heirs.

The defendant by his pleadings alleged title as owner in himself by gift from Mussammat Zainab, alleged that Mussammat Zainab was entitled to the full estate in the property in question, and not merely to an estate for her life, denied that the plaintiff had any right to the estate, denied that the property was ancestral, denied that any law or tribal custom existed which made the gift to the defendant unlawful or void, and amongst other things alleged that he had been adopted as her son by Mussammat Zainab.

The parties to the suit are Sheikh Ansaris of a Pathan tribe of Punjab Muhammadans. The defendant is in possession of the property in dispute under a gift from Mussammat Zainab made to him in her lifetime. The plaintiffs' case, the only case on which they could have succeeded, is that, according to a custom which they alleged to be existing and binding in their family, no woman could take by gift more than a mere interest for her life without any power of alienation in any ancestral property of the family, and consequently that the gift by Mussammat Zainab to the defendant was void. Many issues, some of which, in the view which their Lordships take of this case, were immaterial or irrelevant, were raised by the parties, and much evidence was recorded. The District Judge of Jullundur gave the plaintiffs a decree for possession. From that decree the defendant appealed to the Chief Court of the Punjab. The

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Judges in the Chief Court mainly directed their attention to a question of acquiescence, which their Lordships consider did not arise on the facts, and to the alleged adoption of the defendant by Mussammat Zainab, which was an immaterial issue, and having apparently, although somewhat uncertainly, found that Mussammat Zainab had adopted the defendant, they applied Artice 118 of the Second Schedule of the Indian Limitation Act, 1877, to the case, allowed the appeal, and dismissed the suit with costs.

Although their Lordships consider that the question of adoption was an immaterial issue, they think it advisable to say that the omission to bring, within the period prescribed by Article 118 of the Second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh*[1]. Under the general Muhammadan law an adoption cannot be made; an adoption, if made in fact by a Muhammadan, could carry with it no right of inheritance.

It may be further observed that, even if an adoption by a Muhammadan was permissible by any valid custom in the Punjab, the Chief Court found that it had not been proved that the parties to the suit belonged to a family to which the Punjab agricultural or other similar restrictive customs must be presumed to apply.

In order to understand the material evidence in this case it is necessary to refer to the pedigree of the plaintiffs. Muhammad Ali Sher, the common ancestor of the plaintiffs and Mussammat Zainab, had three sons, one of whom, Jehangir Khan, had, by his wife Mussammat Fatima, a daughter, Mussammat Maryam, who married her cousin, Sarfraz Khan. Alamgir, another son of Muhammad Ali Sher had three sons, one of whom was Sarfraz Khan, who married his cousin Mussammat Maryam; another son of Alamgir was Shahbaz Khan; and the other son of Alamgir was Siraj-ud-Din otherwise called Sheraz-ud-Din Khan, who was the father of the plaintiffs. Another son of Muhammad Ali Sher was Sarwar Khan, who had two sons, one

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[1] (1906) I. L. R. 28 A. 727 (P.C.)

of whom was Muhammad Said; the other son of Sarwar Khan was Muhammad Bahadur Khan. Sarfraz Khan had by his wife Mussammat Maryam, a daughter, Mussammat Zainab, who married Ghulam Mohi-ud-Din *alias* Baghe Khan. The defendant is a son of a sister, Jamal-ud-Din, who was a son of a sister of Sarfraz Khan. Jamal-ud-Din Khan was a brother of Mohy-ud-Din *alias* Baghe Khan.

On the 3rd Ramzan 1248 A. H. Jehangir Khan, by his deed of gift, gave to his daughter Mussammat Maryam, wife of Sarfraz Khan, absolutely all his one-third share of the property of his ancestors which had fallen to his lot according to law, in lieu of the dower of her mother Mussammat Fatima. Mussammat Maryam obtained possession of the property which had been given to her by her father Jehangir Khan, and remained in possession for 15 years, when she gave that property to her husband Sarfraz Khan, who took possession on her death. Mussammat Maryam died in 1846 or 1847. After her death Sarfraz Khan's right to the possession of the property which had come to him from Mussammat Maryam was challenged by Muhammad Said Khan and Muhammad Bahadur Khan, sons of Sarwar Khan, and Sheraz-ud-Din Khan, the father of the plaintiffs, who contested the alienation to Sarfraz Khan, alleging that by custom, daughters had no right of succession. Sarfraz Khan brought a suit for maintenance of possession in the Court of the Deputy Collector against Muhammad Bahadur Khan, Muhammad Said Khan and Sheraz-ud-Din. In that case Sheraz-ud-Din Shahbaz Khan and Muhammad Bahadur Khan, proved that Mussammat Maryam had been in possession of the property, and had, through the agency of her husband Sarfraz Khan and his brother Sheraz-ud-Din, received the rents of the land together with Zamindari dues, and had paid the Government revenue. In that case Muhammad Said Khan testified to the facts of the gift and delivery of possession to Mussammat Maryam, and Sheraz-ud Din admitted that a deed of gift had been executed and that possession had been delivered to Mussammat Maryam. Several other witnesses, including the marginal witness to the deed of gift, proved that the property had remained in the possession of Mussammat Maryam for her life-time, and had, after her death, passed to Sarfraz Khan, her husband. On

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the 16th of May 1849 the Deputy Collector ordered that a decree for Sarfraz Khan's claim be passed to the effect that Sarfsaz Khan should retain possession of the land then in suit. From that order of the Deputy Collector Muhammad Bahadur Khan appealed to the Settlement Officer who, on the 3rd of August 1849, dismissed the appeal, holding that the inquiry before the Deputy Collector had established Sarfraz Khan's possession, occupation of, and title to the land, and that if Muhammad Bahadur Khan had any claim to the land he was at liberty to lodge a suit in a civil court. No suit was brought in a civil court to contest the right or title of Sarfraz Khan to the land which had come to him from Mussammat Maryam. The facts above referred to afford, in their Lordship's opinion, strong evidence that there was no custom applying to this family which limited the estate in ancestral land which came to a daughter by gift to a mere life estate, and which prevented a daughter alienating such lands by gift in her lifetime.

On the 15th of December 1851 Sarfraz Khan, who was then in possession of the land which had come to him by gift from his wife Mussammat Maryam, and was also in possession of his own third share of three shares in the ancestral property which had come to him by lot according to law, made a deed of gift by which he gave to his daughter Mussammat Zainab absolutely his entire property of every kind, and gave her possession. To that deed Shahbaz Khan, son of Alamgir, was one of the witnesses. Sarfraz Khan died on the 10th of May 1852, and on that day the Patwari of Basti Danishmandan, on enquiry of Mussammat Zainab, was directed by her to enter the entire share of Sarfraz Khan, which had come to her, in the official papers in the name of her husband Ghulam Mohi-ud-Din, whose name was accordingly entered on the 10th of May 1852. In or about 1859 Muhammad Bahadur Khan and Muhammad Said Khan brought a suit in the Revenue court of the Extra-Assistant Commissioner of Jllundur against Ghulam Mohi-ud-Din, in which they claimed possession of the lands which had come through Mussammat Maryam and Sarfraz Khan to Mussammat Zainab. The plaintiffs in that suit alleged that Sarfraz Khan had not executed the deed of gift in favour of Mussammat Zainab; that the property in suit could not have passed through

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his wife Mussammat Zainab to Ghulam Mohi-ud-Din, and that as Sarfraz Khan had died without a son the property had vested in them, Muhammad Bahadur Khan and Muhammad Said. In that suit the Patwari of Basti Danishmandan was examined as a witness, and in reply to the question—"In Basti Danishmandan what custom prevails in respect of an "estate left by a sonless proprietor?" said—

"The following custom prevails:—The estate of a pro-"prietor dying sonless goes to his daughters. Should he make "a gift of his property during his lifetime in favour of his "daughters, they succeed to their father's estate. If he does "not make a gift in favour of his daughters during his lifetime "his brothers and brothers' sons succeed to his estate."

Ghulam Mohi-ud-Din gave evidence in that suit; he claimed no title in himself; he said that his wife Mussammat Zainab was the proprietor, and that she had full authority to have her own name inserted in the official papers or to allow the entry in his name to stand Many other witnessess were examined in that suit and on the 25th of June 1859 the Extra-Assistant Commissioner of Jullundur dismissed the suit. From that order dismissing the suit Muhammad Siraj-ud-Din (Sheraz-ud-Din Khan) who had apparently come into the suit as a plaintiff, Muhammad Bahadur Khan, and Muhammed Said Khan appealed to the Deputy Commissioner, who, on the 31st of December 1859, rejected the appeal, but holding that Mussammat Zainab alone was the proprietor, directed that her name should be entered in the column of owners. From the order rejecting their appeal Muhammad Siraj-ud-Din (Sheraz-ud Din Khan), Muhammad Bahadur Khan and Muhammad Said Khan appealed to the Commissioner of Jullunder, who on the 25th February 1860 dismissed their appeal.

On the 6th of May 1887 Baghe Khan (Ghulam Mohi-ud-Din) executed a deed in which he stated that he had adopted Niaz-ud-Din when he was two years old and that he and his wife had brought him up. Niaz-ud-Din, who is mentioned in the deed, is Muhammad Niaz-ud-Din Khan the defendant in this suit.

On the 22nd May 1888 Ghulam Mohi-ud-Din Khan and his wife Mussammat Zainab executed a deed of settlement by which Ghulam Mohi-ud-Din gave certain property of his in Basti

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Danishmandan, which is not in dispute in this suit, to Muhammad Niaz-ud-Din Khan and Mussammat Zainab gave to Niaz-ud-Din Khan the property which is in dispute in this suit. In that deed it is stated that Muhammad Niaz-ud-Din Khan had been placed in possession. An application was made to enter the name of the defendant Muhammad Niaz-ud-Din Khan in the column of proprietor in respect of the property in dispute in this suit, and Mussammat Zainab having stated to the Tahsildar that Muhammad Niaz-ud-Din Khan was in possession, and no objector appearing, the Tahsildar sanctioned the mutation of names, and the name of Muhammad Niaz-ud-Din Khan was accordingly entered in the column of proprietors.

In 1895 and 1896 the principal lands which had been held in unpartitioned shares by Muhammad Niaz-ud-Din Khan, Muhammad Uma Khan and Muhammad Pirdad Khan were, by agreement between them, partitioned, each having allotted to him lands which represented his share. Muhammad Niaz-ud-Din's shares in the partition represented shares which had come to him by the gift of Mussammat Zainab. Mussammat Zainab was then alive; she died on the 4th of May 1899.

Their Lordships consider that those partition proceedings between Muhammad Umar Khan, Muhammad Pirdad Khan and Muhammad Niaz-ud-Din Khan, who were the original parties to the suit, afford very strong evidence in favour of Muhammad Niaz-ud-Din, who is the defendant in the suit, and respondent in this appeal. The evidence which was given on behalf of the plaintiffs to prove that a custom existed and applied to this family, by which a female could take only a life interest in the ancestral property which had come to her by gift from her sonless father, and had, on such property, no power to alienate it by a gift in her life-time, was of the most shadowy description and failed to prove the custom alleged by them. Evidence as to the limited rights by custom of a widow in her deceased husband's property was not evidence from which the custom alleged by the plaintiffs in this suit could be inferred. Nor was evidence that a Muhammadan father had been prevented by some local custom from giving the bulk of his property to one of his sons, evidence which had any bearing on the issue in this case. The evidence to which reference has been made by their Lordships, relating

to the devolution of Jehangir Khan's share to Mussammat Zainab, is entirely inconsistent with the existence of the custom which has been alleged by the plaintiffs.

Umar Khan v. Niaz-ud-din Khan.

Their Lordships find that not only have the plaintiffs failed to prove the custom alleged by them, but the alleged custom has been disproved. They also find that Mussammat Zainab had a full proprietary estate in the property in dispute, and that she made a valid gift of that property to the defendant.

Their Lordships will humbly advise His Majesty that the decree of the Chief Court of the Punjab dismissing the suit of the plaintiffs should be affirmed and this appeal be dismissed with costs.

Solicitor: *Edward Dalgado* for appellants.

Solicitors: *T. L. Wilson & Co.* for respondents.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Abdur Rahim.

Rev. Dr. Albrecht and another	..	Appellants*
v.		(*Respondents*)
Bathee Jellamma	..	Respondent
		(*Petitioner*).

Albrecht v Bathee Jellamma.

Guardians and Wards Act, S. 7—Welfare of minor—Religion in which minor is to be brought up—Father's choice of religion.

In the appointment of guardians for a minor, the paramount consideration with the court is the welfare of the minor.

A Hindu father is entitled to appoint a guardian for his child by will or by word of mouth to the exclusion of the mother. He would not lose the right by becoming a Christian and he is entitled to say in what religion an infant child should be brought up.

Held that, in the circumstances, a case was not made out that the court should interfere with the decision of the father that the child should be brought up in the Christian religion.

Appeal from the order of the District Court of Guntur in O. P. No. 144 of 1909.

R. Kuppuswamy Aiyar for appellants.

T. Ramachandra Row for respondent.

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* A. A. O. No. 32 of 1910. 29th December, 1911.

Albrecht v. Bathee Jellamma.

Wallis J.

The Court delivered the following

JUDGMENT:—*Wallis* J.—This is an appeal from an order of the District Judge of Guntur appointing the respondent, a Hindu widow, guardian of her minor daughter and directing the counter-petitioner, Dr. George Albrecht, who belongs to an American Mission, to deliver up the minor to her mother. There was some conflict of evidence, but on a careful examination the facts proved seem to me as follows. The petitioner and her deceased husband lived at Tallapalli, some 14 miles from Rentachintaka, the head quarters of the respondent, who accordingly visited Tallapalli in the course of his missionary tours. According to his evidence, which I see no reason to disbelieve, Narasayya, the petitioner's husband and father of the minor, came to him and asked to be baptised. The request was refused as he was living with a concubine, but he continued to attend the counter-petitioner's services. His wife also asked the counter-petitioner to baptise her and get her husband to take her back. The counter-petitioner accordingly went to Tallapalli, held an enquiry, and induced Narasayya to take back the petitioner as there was no proof that she was leading a bad life as he suspected. About a week later he came and complained that he had found her pregnant when he took her back. Later there was another enquiry when Narasayya drowned the child which had been born in the meantime. Narasayya and the petitioner went on living apart, the minor at first living with the petitioner. In 1903 Papamma, Narasayya's daughter by a concubine, was baptised, and in October 1905 Venkayya, a grown up son of Narasayya by a concubine, was also baptised.

In November 1905 Narasayya came to Rentachintaka and got the respondent to baptise the minor, and some time later he came again and said that his toddy had been poisoned and that he was not likely to live long, and asked the respondent to take charge of the minor, in case anything happened to him, and respondent promised to do so at his house in Rentachintaka but did not then take the girl into his school. According to the respondent's evidence, Narasayya had previously asked Mrs. Albrecht to take the girl and look after her, but she had not then consented.

The respondent's witness No. 3, who had for many years been Village Munsif and has since retired, says that Narasayya

took the minor from the petitioner's custody about four months before his death in 1906 ; that when the counter-petitioner came to the village Narasayya asked him and Mrs. Albrecht to take charge of the child, but they told him to keep it for six months. The respondent's witness No. 4, Narasayya's younger brother, also speaks to this, as does the respondent's witness No. 6, another relative of Narasayya.

In January 1906 Narasayya was found murdered, and when the acting Tahsildar, the respondent's witness No. 1, went to enquire he found living in Narasayya's house, in addition to Narasayya's concubine and a son by a former concubine (Venkayya), a little girl aged 5 or 6 who was said to be the daughter of Narasayya and the petitioner, but not the petitioner herself who was living elsewhere. There was then no reason for pretending that the minor was living there if she was not, and I have no doubt that the minor was living with her father and not with her mother at the time of his death. A short time afterwards the minor and Narasayya's daughter by his concubine were brought to the respondent at Rentachintaka by Venkayya, his grown up son by a previous concubine. The petitioner and also Venkayya were afterwards charged with Narasayya's murder but discharged. At the time of inquiry Venkayya was not called by either side, but was present and said to be assisting the petitioner. The petitioner in her evidence not only denies misconduct but also that she was ever put away by her husband. She denies that she ever asked the respondent to get Narasayya to take her back, or that there was any panchayat, or that her husband repudiated the son who was born two years before his death. She says that after her husband's death she was at her husband's house when the Magistrate came to the village, but his evidence is the other way. She also says that the minor was living with her and was kidnapped while she had gone to a field. The petitioner's witness No. 1 says that the minor was living with the petitioner when she was taken to the respondent and that the petitioner was living amicably with the deceased. The petitioner's witness No. 2 also says that the petitioner was living with Narasayya till his death. Her brother, the petitioner's witness No. 3, also says she was living amicably with her husband and that she was at his house when the Magistrate came to inquire after the murder.

Dr. Albrecht v. Bathee Jellamma. Wallis J.

On a careful consideration of the evidence I am unable to take the same view of it as the District Judge. I see no reason to disbelieve the respondent's story as to the difference between the petitioner and her husband, as to his attempts to settle them, as to Narasayya having had his illegitimate daughter baptised in 1903 and having brought the minor to Rentachintaka to be baptised in November 1905, and as to his having asked the respondent, both at Rentachintaka and on an earlier occasion, to look after the minor after his death. He was then under an apprehension which proved well-founded. He had separated from his wife on an allegation of misconduct and had subsequently taken the minor away from her. He had made all his children Christians, and was only prevented from being baptised himself because he was unwilling to put away his concubine. These considerations appear to me to sufficiently explain his action. After his death the minor, early in 1906, was handed over to the respondent and has since been in his charge. She was produced in court and appears to be healthy and well-cared for. In September 1906, the petitioner prosecuted the respondent for kidnapping, but the complaint was dismissed. In her present petition she states that she subsequently sued him, but in her evidence she denied this and the respondent was not asked about it. The present petition was not presented until March 1909, 3 years after the minor came into the respondent's custody, and the delay is not satisfactorily explained; on these findings of fact it remains to be considered what order ought to be passed. As a Hindu the father was entitled to appoint a guardian for his child by will or word of mouth to the exclusion of the mother—*Soohah Doorhga Tala Tha* v. *Raja Neelanand Singh* [1]—and this right under the Act of 1850 he would not lose by becoming a Christian. Further, the result of the authorities as held in *Mookund Lal Singh* v. *Nobodip Chunder Singha* [2] is that *prima facie* the father is entitled to say in what religion an infant child should be brought up. These wishes, however, are not conclusive. The paramount consideration is the welfare of the minor and, when applied to, as here, under S. 7 of the Guardians and Wards Act, the court has to decide the question with reference to all the considerations set out in the section.

1. (1867) 7 W. R. 74. 2. (1898) I.L.R. 25 C. 881.

Dr. Albrecht v. Bathee Jellamma — Wallis J.

Where, in the opinion of the court, it would be injurious to the minor to give effect to the father's wishes, the court will interfere even in his lifetime as in *Mokund Lal Singh* v. *Nobodip Chunder Singha* [1] where a father was prevented from altering the religion of his son. In considering, in the present case, whether to disregard the wishes of the father and restore the child to the mother, the fact that before the present application was put in the minor had been left for three years in her present custody and was being educated as a Christian, in my opinion, most materially affects the question and makes it much more difficult to interfere than if the application had been made before the child had become accustomed to its present surroundings and the ways of thought in which it is being brought up.

On a consideration of all the circumstances I do not think it would be for the welfare of the minor to interfere on this application with the agreement which the deceased father made for the minor's custody after his death, and I would therefore refuse the application and reverse the order of the lower court. There will be no order as to costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim.

Gurusawmi Nadar and others .. Petitioners* (*Accused*).

Gurusawmy Nadar *In re.*

Cr.P.C., Ss. 144, 7—*Duty of Divisional Officers—Assistance in exercise of lawful rights.*

It is the duty of the Divisional Officer, who is responsible for the peace of his division, to use his authority for the protection of persons who seek to exercise a right which the law allows them and to restrain persons who threaten to obstruct the exercise of such right, and for this purpose to enforce, if necessary, the provisions of S. 107, Cr. P. C., not against the former but against the latter.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revise the proceedings of the Sub-Divisional Magistrate of Sattur in M.C. No. 5 of 1911.

S. Swaminadhan for the accused.

E. R. Osborne for *the Public Prosecutor* for the Crown.

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* Cr. Rev. C. No. 529 of 1911. 2nd January, 1912.
Cr. Rev. P. No. 399 of 1911.

1. (1898) I.L.R. 25 C. 881.

Gurusawmy Nadar *In re.*

The Court made the following

ORDER:—There is absolutely no warrant for the order of the Sub-Divisional Magistrate. There is no evidence to show that the accused were likely to commit a breach of the peace or disturb the public tranquility or do any act which would probably occasion a breach of the peace. All that is found is that on a previous occasion, about a year ago, the Nadars asserted their right to carry palkis through the public street on occasions of marriage, and there was a breach of the peace as some people in the village opposed the Nadars taking palkis in procession on the ground apparently of the Nadars' caste which, in their opponents' estimation, is not high enough to justify their using palkis during marriage. Nothing particular happened at the time the present proceedings were instituted, except that the marriage season was fast approaching and the police and the Sub-Divisional Magistrate were apprehensive that if the Nadars insisted on their right as before and the other party opposed them there might be a disturbance. It is not even shewn that the accused had any marriages to celebrate in their family, and that they were preparing to carry palkis in procession. All that is alleged against them is that they are leading men of their community. Supposing that some of the Nadars or the accused themselves wanted this year to take palanquins in procession through streets, they would have every right to do so and if any person wanted unlawfully to oppose them in the exercise of such right, it is they that ought to be bound then and not persons who were lawfully exercising or wanted to exercise their ordinary right. It is the duty of the Sub-Divisional officer who is responsible for the peace of his division to use his authority for the protection of persons who seek to exercise a right which the law allows them and to restrain persons who threaten to obstruct the exercise of such right, and for this purpose to enforce, if necessary, the provisions of S. 107, Criminal Procedure Code, not against the former but against the latter. I set aside the order under S. 107, Criminal Procedure Code, and the bonds executed by the accused will be discharged.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr: Justice Spencer.

Sri Raja Malaraju Lakshmi Venkayamma Row Bahadur Zamindar Garu .. Appellant*
(*Plff.-decree-holder*)

v.

Gopesetti Narayanaswami Naidu Garu, Receiver, Nidadavole Estate .. Respondent
(*Deft. judgment-debtor*).

Venkayamma Row *v.* Narayanaswami Naidu.

Mesne profits—Ascertainment—Decree for rents—Pronotes for rent—Costs of infructuous proceedings.

Plaintiff obtained a decree for possession of property with mesne profits. The property was in the hands of a Receiver on behalf of the defendants : *Held* on the question of the ascertainment of mesne profits: that (1) the plaintiff was entitled to what the Receiver actually received or with due diligence might have received ; and, where the Receiver had sued tenants and obtained decrees for rents—the plaintiff was entitled to those decrees only and not to the amounts covered by them.

(2) That in respect of rents due for certain faslis but unrealised owing to certain mistaken but *bona fide* proceedings the failure to realize the rents was itself no answer, and that, in the absence any proof that the Receiver could not have realized them even though he had taken appropriate proceedings, plaintiff was entitled to the amount.

(3) That the plaintiff was not liable to accept pro-notes executed by the tenants in favor of the Receiver but was entitled to the amount of rent for which he took the pro-notes.

(4) That the plaintiff could not be saddled with the cost of infructuous distraint proceedings taken by the Receiver.

Appeal from the order of the Subordinate Judge's Court of Kristna at Ellore in E. P. 6 of 1906 in O. S. No. 32 of 1903 on the file of the District Court of Godavari.

T. V. Seshagiri Aiyar and *P. Nagabhushanam* for appellant.

C. R. Tiruvenkatachariar for respondent.

The Court delivered the following

JUDGMENT :—*Abdur Rahim* J.:—The question raised by this appeal relates to mesne profits of a village called Repudi which is in possession of the Receiver of the Nidadavole estate. The appellant obtained a decree for recovery of the village in the court of the District Judge of Godavari but in an appeal by one out of the three reversioners entitled to the Nidadavole

* A. A. O. No. 216 of 1909. 2nd January, 1912.

Venkayamma Row v. Narayanaswami Naidu.

Zamindari who were also entitled to the estate of Papamma Row, the widow of the last Zamindar, it was held by the High Court that there had been no completed transfer of the village by Papamma Row, who had bought it with her own money, the plaintiff and hence she was not entitled to recover one-third share of the village which represented the share of the contesting reversioners. An appeal has been preferred from the judgment of the High Court to the Privy Council and is still pending decision. The dispute relating to one-third share in the village was not therefore finally determined, but in as much as the mesne profits in any event have to be determined, we have proceeded to hear this appeal which raises certain questions as to the principle on which the mesne profits are to be ascertained. The Receiver, we may mention, was appointed in a suit between the reversioners themselves, who, as already mentioned, are also heirs of Papamma Row.

The first question raised by the appeal arises in these circumstances. Papamma Row during her lifetime paid only part of the purchase money of the village Repudi. So the vendor after the death of Papamma Row sued the Receiver, who was in possession as representative of Papamma Row's estate, and recovered the unpaid balance of the purchase money with interest and costs of the suit. The lower court, so far as we can make out from its judgment, which, we may observe, is so vague as to be almost unintelligible on this and some other points, has held that this amount should be deducted from the mesne profits payable by the Receiver. We think this is clearly wrong. What was held by the court of first instance (O. S. No. 32 of 1903) was that Papamma Row made a valid transfer of the village to the plaintiff, of which, however, she herself was to remain in possession as long as she lived, and that she would pay the balance of the purchase money. We hold, therefore, that this plaintiff is not liable to pay the sum nor the interest on it nor the costs of the suit instituted by the vendor of Repudi against the Receiver. It is to be noted that Mr. Seshagiri Iyer, the learned Vakil for the appellant, did not press his objection as to the liability of his client for a portion of the peishcush for fasli 1309 inasmuch as no such objection was taken in the lower court.

The 2nd question concerns the rate of interest on the mesne profits. The Subordinate Judge has allowed 3¾ per cent., the rate which the Receiver received from the bank in which he kept the money in deposit. It is rightly contended by the appellant that the ordinary court rate is 6 per cent. but having regard to the peculiar facts of the case we are not prepared to hold that the interest allowed by the lower court is too low.

The 3rd item which is covered by grounds Nos. 6 and 7 of the plaintiff's objections to the Commissioner's report involves the consideration of the following questions. The first is whether the plaintiff is entitled to hold the Receiver, who is undoubtedly in wrongful possession of the village, being in possession on behalf of the heirs of Papamma Row, liable for the rents for which the Receiver has obtained decree and which he has been willing to assign to the plaintiff. The plaintiff at first accepted the decrees but now claims that she is entitled to recover from the Receiver rents for which the decrees were obtained and is not bound to accept the decrees in lieu thereof. But we do not think her claim can be sustained. She is only entitled to what the Receiver actually received or might with due diligence have received. He has, with due diligence, tried to recover the rents and obtained the decrees, and we do not see any reason why he should be compelled to execute them and recover the amounts for plaintiff.

In connection with the 3rd item the next question relates to a sum of Rs. 1,136-4-11 which is entered in the suspense account in the revised statement of the Commissioner dated the 8th March 1909. It is not very clear what this amount relates to. But the learned pleader for the respondent says it represents the rents for which the Receiver levied distress, but the distraints having been found to be illegal the rents were not recovered. This would appear to be so from the 12th paragraph of the Commissioner's report. Now it appears the Receiver tendered pattas to the tenants in the same terms as the previous pattas for about four years which the tenants had accepted. But the tenants objected to the pattas tendered. The Receiver, in spite of the objection, adopted the summary procedure of distraint instead of filing a suit to enforce acceptance of pattas. The first court found the distraint to be illegal and this decision was upheld in appeal. It does not

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appear, so far as can be gathered from the record to which our attention has been drawn, what led the Receiver to adopt the summary procedure and whether there was or was not any justification for it except the fact that in four previous faslis the tenants had accepted similar pattas. On the other hand the Receiver was made to pay costs to the tenants and it is contended—and there is some force in the contention—that the tenants would not have been allowed costs if their conduct had misled the Receiver into tendering the pattas found to be illegal and levying distraint relying on these pattas. It is difficult, however, in the absence of the record of the distraint proceedings, to express any decided opinion on the question how far those proceedings were justified. But the real question is whether the Receiver could have realised the rents with due diligence or not.

The fact that he failed to realise the rents due for the faslis in question by means of certain mistaken but *bona fide* proceedings is in itself no answer to the question. It is not suggested that if he had demanded proper rents and taken appropriate proceedings for their realization, he could not have realized them. Even supposing that he was misled by the previous pattas there is no explanation forthcoming why he did not institute proper proceedings as soon as objection was taken to the pattas tendered or at least as soon as the court of first instance decided against him. We hold that the plaintiff is entitled to recover from the Receiver the rents entered in the suspense account.

Another question in connection with the 3rd item is whether the plaintiff is bound to accept certain promissory notes which the defendant obtained from certain tenants for arrears of rent. This question must be answered in the negative. The promissory notes may not be of any valne to the plaintiff and unless it is shown that circumstances compelled the defendant to take that course, he must make good the amount of rent for which he took the promissory notes.

The 4th item relates to the costs of distraint proceedings. The person in wrongful possession when accounting for the mesne profits is entitled to be reimbursed all necessary and proper expenses incurred in the management of the property in his possession. But it does not stand to reason that he should saddle the

owner of the property with the cost of infructuous proceedings instituted by him through a mistake however *bona fide*. Further proceedings by way of distraint are of an exceptional and summary character and the person who adopts such proceedings does so at his own risk—*Doraisami Pillai v. Muthusamy Mooppan*[1] and *Munappa v. Dasineni*[2]. We therefore hold that the Receiver is not entitled to recover the costs of the litigation arising out of distraint proceedings from the plaintiff.

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Abdur Rahim J.

This disposes of all the questions argued before us by Mr. Seshagiri Iyer.

As regards the memo of objections the only item asked before us is that relating to interest on the unpaid purchase money, peishcush. We have found that the plaintiff is not bound to pay the unpaid balance of purchase money but the Receiver is entitled to interest on peishcush paid by him after Papamma Row's death.

We have not attempted to settle figures under the different heads as it was argued that they could be more conveniently settled in the lower court.

With these directions the case will be remitted to the lower court; each party will receive the costs of the appeal and the memo of objections from the other in proportion to his success. The costs will be determined by the lower court.

Spencer J.—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Govinda Naicken and another .. Appellants *
(*Plaintiffs*)

v.

Apath Sahaya Iyer *alias* Aiyavu Iyer .. Respondents
(*Defendants*).

Specific Relief Act, Ss. 15, 17—Contract to sell property, to the whole of which defendants were not entitled—Specific performance.

Govinda Naicken v. Aiyavu Iyer.

A court will not lend its sanction to a transaction devoid of legal effect, and, consequently, it will not decree specific performance of a contract to sell land by ordering execution of a deed by a person who has no title to the whole property.

Where there has been great delay in attempting to enforce a contract and circumstances have greatly changed either from a rise of prices or other causes in the interval, courts would be justified in refusing to give legal effect to an inequitable arrangement.

Second appeal from the decree of the District Court of Tanjore in A.S. No. 614 of 1909 presented against the decree of the Court of the District Munsif of Tiruvalur on O.S. No. 174 of 1908.

* S. A. No. 1351 of 1910. 5th January, 1912.

1. (1903) I.L.R. 27 M. 94.
2. (1883) I.L.R. 7 M. 138 at p. 144.

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The Hon'ble The Advocate-General (*P. S. Sivaswami Aiyar*) and *T. Narasimha Aiyangar* for appellants.

T. R. Ramachandra Aiyar and *M. Subramania Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—The suit was brought for specific performance of a contract to sell certain lands. Although the agreement to sell was executed by the defendant alone, it was stated in the document that the lands were being enjoyed in equal shares by the defendant and the defendant's divided elder brother and that they had been purchased out of money belonging to them severally. The defendant agreed to have the proposed sale deed executed by himself and by his brother on his own account and as guardian of his minor son.

The District Munsif found (1) that both the parties knew full well at the time of execution of the agreement to sell (Ex. A) that one-half of the land belonged to Ramaswami Iyer and his son, (2) that the agreement fell through owing to the default of both parties. Referring to illustration (*a*) to S. 15 of the Specific Relief Act and to S. 17, he decided that this was not a case in which specific performance of a part of the contract could be enforced in as much as the defendant was not competent to transfer the half to which he did not possess a title and as the plaintiff made no offer to purchase the defendant's own half, paying the price agreed upon and waiving all right to compensation for deficiency or for loss. The District Judge did not agree with the District Munsif upon this point. He was unable to see that there was anything to debar the plaintiff from asking for a sale deed for the whole land to be executed in his favour by the defendant as stipulated in Ex. A, the plaintiff being allowed to take the document for what it was worth. The District Judge further remarked that he found no reason for declaring the agreement unenforceable on general grounds. He declined, however, to give the plaintiff a decree on account of his delay of 3 years in instituting the suit.

In a case of minors when a suit was brought for specific performance of a contract of a sale and the contract was found to be not binding on the minors this court in *Poraka Subbarami Reddi* v. *Vadlamudi Seshachelam Chetty* [1] observed : "If the contract is indivisible under S. 17 of the Act, what then is the relief to which the plaintiff is entitled? We are asked by the appellant to give him a decree for the whole against the 1st and 4th defendants on the authority of *Srinivasa Reddi* v. *Sivarama Reddi* [2]. This we are unable to do."

1. (1909) I.L.R. 33 M. 359. 2. (1909) I.L.R. 32 M. 320.

In that case the appellant expressed his willingness to take a conveyance from the 1st and the 4th defendants, of all their interests in the suit properties for the purchase money agreed upon without abatement or compensation, and a decree for that relief was granted accordingly. This course is not open in the present case as the appellant does not ask for it.

The cases of *Kosuuri Ramaraju* v. *Ivaluri Ramalingam* [1] and *Srinivasa Reddi* v. *Sivarama Reddi*[2] were both cases in which a managing member of an undivided family contracted to sell undivided property without the concurrence of other members. Without determining whether the sale by the manager would bind the other members, it was considered that the plaintiff was entitled to a decree for specific performance. S. 15 of the Specific Relief Act was not applied for the reason given in the latter decision, *viz.*, that an undivided father has an interest in every portion of the undivided property. But when the family is undivided as here, S. 17 distinctly prohibits a court from directing the specific performance of a part of a contract except in accordance with the preceding sections. Even in cases where the conditions of S. 15 are fulfilled, the use of the word 'may' indicates that the granting of a decree for part performance is discretionary with the court, and we should hold that when there has been great delay in attempting to enforce a contract and circumstances have greatly changed either from a rise of prices or other causes in the interval, the courts would be justified in refusing to give legal effect to an inequitable arrangement.

Now the plaintiff in the present case wants the court to compel the defendant to execute a deed of sale for the whole property and if he refuses to issue one in his name under the seal of the court and to allow him to make what he can out of the title thus conveyed such a request is quite inadmissible. A sale is a transfer of ownership in exchange for a price (S. 55 of the Transfer of Property Act). The defendant has nothing which he is capable of transferring in the moiety of the property of which he is not the owner and is not in possession. It is impossible to sever the execution of the deed from the transfer to be effected thereby and to treat them as separate acts of the same person.

The court will not lend its sanction to a transaction devoid of legal effect. See DART'S *Vendors and Purchasers* pp. 1072-3; FRY on *Specific Performance*, paras 1,000,1002; BANERJI on *Specific Relief*, pp. 457 to 467.

1. (1902) I.L.R. 26 M. 74. 2. (1909) I.L.R. 32 M. 320.

Govinda Naicken v. Aiyavu Iyer.

The case of *Barret v. Ring* [1] referred to for the appellant is not in point as there the vendor was not without any title at all to the property agreed to be conveyed. Moreover the execution of a sale deed by the 1st defendant over property which does not belong to him would be an act improper in itself as it is calculated to throw a cloud over the title of his brother which would be sufficient to give him a cause of action for a declaratory suit. The court will not compel him to do such an act.

The second appeal is therefore dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arthur J. H. Collins, *Kt.*, Chief Justice, and Mr. Justice Parker.

Allareddi Subbamma .. Appellant* (*Plaintiff*)

v.

Nallapareddi Audilakshmamma and others .. Respondents (*1st, 2nd, 3rd & 7th Defts.*).

Subbama v. Audilakshmamma.

Two families living together without 'illatom' or other family arrangement—Rights of—Equal rights claimed by custom—Validity of custom—Admissions—Effect of, when made in ignorance of legal rights.

There is no custom in the District of Nellore that, when two families live together and there are intermarriages amongst the members thereof the two families have equal rights in the properties which they hold and enjoy.

Such a custom may be legal if it originated in an arrangement of the parties concerned or is otherwise dependent on family arrangements.

A custom to be effective must be a territorial custom, and isolated cases are of little value unless it be proved that the two families living together have been united together on equal terms.

An admission of the defendant in favour of the plaintiff in ignorance of her legal rights will not bind her if, as a matter of fact, the plaintiff had no legal claims.

Appeal from the decree of the Court of the District Judge of Nellore in O. S. No. 6 of 1886.

The suit out of which this appeal arises was brought by the plaintiff Allareddi Subbamma for partition and separate possession of a half share of the family properties in the possession of the first defendant. The plaint alleged that the Allareddi family to which the plaintiff belonged and the Nallapareddi family of which the first defendant was a representative had been living together from time immemorial; that each family

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* A. No. 179 of 1887. 13th September, 1888.

1. (1854) 2 Sm. and Giffard 43.

Subbama v. Audi-lakshm-amma.

had equal rights in the joint family properties of both; that the debt bonds and other securities belonging to the family stood in the name of the first defendant's husband Venkataramireddi, who was the manager of the joint family; that after his death in 1875, a certificate of heirship was granted to his widow and the plaintiff's son, who were then jointly entitled to the family properties; that subsequent to the certificate, documents to the extent of Rs. 10,000 were renewed in plaintiff's son's name but that he died shortly thereafter in September 1879 and that, subsequent to his death, certificate of heirship was applied for in the joint names of the plaintiff and the first defendant but the certificate was granted to the first defendant alone without opposition, she being the senior member of the two families; that since then quarrels having arisen between the parties, the first defendant was dealing with the properties as if they were her own and had mortgaged portions of them with the other defendants, and that the plaintiff was therefore entitled to a partition of her half share.

The defendants resisted the suit on the ground that the whole of the family properties belonged to the Nallapareddi family, of which the first defendant was a member, and that the Allareddi family had no rights thereto. Referring to the succession certificate, the first defendant explained the plaintiff's son having joined her in obtaining it on the ground that she had a daughter whom she intended to give in marriage to the plaintiff's son.

Under the directions of the court, the plaintiff filed a genealogical tree showing the relationship between the plaintiff's family and the defendant's family and the various intermarriages which had taken place between the respective members thereof. As to the two families having lived together and as to the share that the plaintiff claimed in consequence of such joint living her case was, in her reply statement, set forth as follows:—

"There are cases among Hindus, and more especially in the Pantakapu caste to which the parties belong, where a rich person marrying a woman brought into his family his wife's brothers if they happen to be poor, entrusted them with the management of his household and his cultivation, and thus for a few generations they live joint with intermarriages in the two families but that when they separated they separated dividing their property into two equal halves. These cases, though not judicially noticed, are not few in number, and the practice can be established by evidence. When two families jointly lived and worked for some generations throwing their gains and labour into the joint stock

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it may be fairly presumed, in the absence of any express agreement to the contrary, that they intended to live in joint tenancy and to share equally the family property when a separation was needed."

Amongst the issues raised, the most important was the first issue:

"Whether the family of the plaintiff and the first defendant viz., the Allareddi and the Nallapareddi families, have been, from time immemorial, living together in joint enjoyment of the property in suit and, if so, whether the plaintiff, as the admitted present representative of the Allareddi family, is entitled to claim partition of one-half or other share of such property."

The District Judge found that the first defendant's family was the original family and that the Allareddi family subsequently joined this family. He also held that the Allareddi family brought little or no property into the defendant's family but that the two families lived together and jointly enjoyed all the properties. He found that the plaintiff's son was associated with the first defendant in the succession certificate because the latter's daughter was to be given in marriage to the former and he was intended to be taken as *illatom* into the Nallapareddi family but that the *illatom* not having been perfected by marriage, no rights to the properties vested in the plaintiff's son or his representatives.

Speaking of the custom set up of two families living together and each family thereby acquiring equal rights in the family properties, the District Judge said :—

"Numerous witnesses of the Pantakapu class were examined for the plaintiff in the endeavour to establish a sort of general custom among them that when two families live together each is entitled to a half share in the property. In every case there had been *illatom* or special arrangement or it could not be said that each family had not contributed something to the general stock."

The District Judge dismissed the suit and the plaintiff appealed.

V. Bhashyam Aiyangar and *C. Ramachendra Rao Sahib* for appellant.

H. G. Wedderburn, *K. P. Sankara Menon* and *N. Subramaniam* for respondents.

The Court delivered the following

JUDGMENT:—The plaintiff's claim is based upon an allegation that her husband's family, the Allareddi family, has

for a long time been joint with the family of the 1st defendant's husband, the Nallappareddi family having equal rights in all their property.

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The evidence shows that there have been no less than three intermarriages between the Allareddi and Nallapareddi families. It is admitted that whatever landed property there is in suit stands in the name of the Nallapareddi family, and the appellant's pleader is not able to show that any property stands in the name of the Allareddi family. When Venkatramireddi, No. 8, in the pedigree, died in 1875, the male members of the Nallapareddi family became extinct, and it was not unnatural that plaintiff's son Subbareddi, who was to be married to the only daughter of Venkataramireddi should, by arrangement, be allowed to take out the heirship certificate. In the petition, he is described as the undivided nephew and son of Venkataramaireddi's senior uncle's daughter, which might fairly enough represent the relationship though it was not co-parcenership according to Hindu Law. That Subbareddi prosecuted and defended suits after getting the heirship certificate proves nothing, as it was most probably with that object (he being the only male left in the house) that the arrangement was made.

Subbareddi died in 1879 unmarried, and when he died the two widow ladies undoubtedly represented themselves as joint in the petition which they put in asking for an heirship certificate. The certificate was as a matter of fact given to the 1st. defendant only without opposition, she representing the Nallapareddi family in whose name the landed property stood. Had there been any co-parcenership and had Subbareddi (plaintiff's son) represented the last male holder, it seems to us very improbable that the plaintiff would have agreed to the certificate of heirship being issued in the name of the 1st defendant only.

Turning to the oral evidence, a good many witnesses were called to prove that a custom similar to that under which the plaintiff claimed prevails in the Pantakapu caste in the Nellore District. It was admitted that the evidence is not sufficient to establish a territorial custom but it is urged that the facts of the case, and the history of the two families and the conduct of the parties are sufficient to show that these families are in a similar position as those other families with regard to which evidence was called, and it is contended that from this state of facts it is right to infer an arrangement and trace it to a legal origin by virtue of which the plaintiff would be entitled

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to half the property. From the evidence which has been brought, it seems clear that all the witnesses, in cases where a similar custom has been spoken of, have traced that custom to an arrangement of the parties, and that similar customs, where dependent upon family arrangements, may be held legal as may be inferred from the decisions in *Challa Papi Reddi* v. *Chaka Koti Reddi*[1] and *Hanumanthamma* v. *Rami Reddi*.[2] In our opinion, however, isolated cases are of little value unless it be proved that these two families have been united together on equal terms. There is nothing to show that any member of the Allareddi family has ever managed any of the lands which stand in the name of the Nallapareddi family except Subbareddi, and he, only after the death of the last male owner in the Nallapareddi family. There is, however, evidence on record to show why it was that Subbareddi, the father of the plaintiff's husband, did join the Nallapareddi family and that is given by the evidence of the plaintiff's 1st witness and of the 1st defendant's 5th witness, both of whom stated that he was taken into the Nallapareddi family on account of his poverty. This was not unnatural as the Nallapareddi family was wealthy. Subbareddi's mother had been a member of that family and his two children had both married into it, his son having married the daughter of Gangireddi and his daughter having married Venkataramireddi. The arrangement, if regarded as a union, was therefore unequal and though plaintiff's son, if he had lived to marry Venkataramireddi's daughter, would virtually have got the whole estate, he had no legal right to claim the half. There is nothing really therefore to prove the plaintiff's claim except the fact that these two ladies stated they were joint when making their applications for certificate of heirship to Subbareddi in 1879. They were at that time living together and undoubtedly had always done so. But an admission of the 1st defendant in ignorance of her legal rights will not bind her, if as a matter of fact the plaintiff had no legal claim. The same remark will apply to the admission made by the 1st defendant in Exhibit A 24 the deed executed on the 20th September 1882.

Being of opinion that the plaintiff has failed to prove the basis of her claim we must dismiss the appeal with costs. The costs of the respondents other than the 1st will be proportionate to their interest. Memo of objections is not pressed.

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1. (1872) 7 M.H.C.R. 25. 2. (1881) I.L.R. 4 M. 272.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Muthusawmi Aiyar and Mr: Justice Best.

Gadiyam Narayudu .. Appellant*
v. (*Petitioner*)
Mallavarapu Venkamma .. Respondent
(*Defendant*).

Illatom—What constitutes illatom.

It is not sufficient to constitute a person an *illatom* that he lives in his father-in-law's house, assists his widow after her husband's death and is employed by her to pay the Circar kist. Narayudu *v.* Venkamma.

To constitute a person an *illatom* a specific agreement is necessary.

Quaere.—Whether a female could, after her husband's death, when her husband's daughter was already married, consitute that daughter's husband an illatom son-in-law.

Appeal from the decree of the District Judge of Nellore in O. S. No. 29 of 1886.

The suit out of which this appeal arose was a suit for partition in which the plaintiff claimed a half share of the family properties, on two grounds, one of which was that the defendant's daughter was given in marriage to the plaintiff in 1875, that the plaintiff was, since then, an illatom in the defendant's family, and had been and was managing the family affairs.

The plaintiff was the adopted son of one Jali Reddi. His natural mother and the defendant's husband were the children of one Kothandarami Reddy, a Pantakapu Reddy of Karumanchi in the Ongole Taluk. The plaintiff's adoptive father Jali Reddi had two sisters, one of whom was married to the said Kothandarami Reddi. The plaintiff's case was that after the death of Kothandarami Reddi's wife, when his son was still young, he asked the plaintiff's adoptive father's father Papi Reddi to join the family with all his property, on the understanding that each family was to be entitled to a half share in the joint properties, and that, since then, the plaintiff's grandfather and father were living in this family and the plaintiff's and the defendant's families were enjoying the properties of both. The plaintiff was managing the family properties, paying the Circar kist and assisting the defendant generally in all the family affairs, but owing to quarrels having arisen since the plaintiff's

* A. No. 37 of 1888. 26th August 1890.

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wife's death, the plaintiff desired to have his share separated from that of the defendant. In the 8th para of the plaint it was said that :—

"In the Pantakapu caste, to which the plaintiff and the defendant belong, there is a custom that if two families united their property for whatever cause and remained joint for some time and then desired division, the two families would be entitled to equal rights in all the moveable and immoveable properties existing at the time of division."

The defendant denied the arrangement referred to in the plaint as also the *illatom* of the plaintiff, and contended that the custom set up in the eighth para of the plaint was false.

The District Judge found that the illatom was proved but that under the illatom custom, the illatom son-in-law had no right to enforce a partition during the lifetime either of his father-in-law or his mother-in-law, and he doubted whether an illatom son-in-law who has had no children can claim such a share. The District Judge said as follows :—

"*Illatom* was once defined by Reddi witnesses before this court to consist in *marrying a man to a daughter and keeping him in the house.* In this instance it is not clear what the father-in-law of plaintiff did. He seems to have died within a year of the marriage of plaintiff and there is nothing to show that he associated plaintiff with himself in the management of property. But the evidence, and the admission of defendant as to her using plaintiff, seem to make it clear that plaintiff was kept in the house afterwards. It appears, therefore, that if the position of an illatom had not been conceded to plaintiff definitely by the husband of defendant, it had been practically allowed by the defendant herself. But the girl has died, and plaintiff, as appears from the evidence, demands her sister in marriage, and as her hand is refused him, demands half of his father-in-law's property. Now it has never been settled that an illatom can demand a partition. Certainly there is no sort of proof that an illatom has ever done so successfully from his father-in-law or mother-in-law except under an agreement, oral or written. I consider this fact fatal to the claim of plaintiff. But there is a further point.

"The position of illatom has its duties and obligations. He is not like an adopted son taken into the family completely ; for

he does not forfeit his right to share in the property of his own family. He is simply taken in, in order that the property of the family which receives him may be kept in the family and go to the children of its daughter either alone or in conjunction with sons. In all the cases adduced in which illatom have, apart from special agreement, been allowed shares, they have had children. Here plaintiff's wife has died and he has no children. Can he claim to be allowed to go out of the family and take a portion of its property with him? There must have been cases like this before, but not a witness can speak to a case in which such claim was allowed. On the other hand, plaintiff's 3rd witness mentions a case in his village where an illatom, whose wife died, was turned out of his father-in-law's house without a share."

The contention that there was a custom in the Pantakapu caste of two families living together sharing their properties equally, was also found against, and, as would be seen from their Lordships' judgment, was not put forward in the appeal.

The District Judge dismissed the suit and the plaintiff appealed.

M. O. Parthasarathy Aiyangar for appellant.

N. Subramaniam for respondent.

The Court delivered the following

JUDGMENT:—*Best* J.—The point taken by Mr. Parthasarathy Aiyangar on behalf of the appellant at the hearing of the appeal is that as the District Judge has found the issue as to illatom in favour of plaintiff, he ought to have decreed to plaintiff the moiety of the property claimed by him, notwithstanding the findings adverse to plaintiff on the other issues.

The Judge's finding as to illatom is that "if the position of an illatom had not been conceded to plaintiff definitely by the husband of defendant, it had been practically allowed by defendant herself." The reason given for this finding is that "the evidence and the admission of the defendant as to her using plaintiff seem to make it clear that plaintiff was kept in the house" after the defendant's husband's death, which took place in the year in which plaintiff married her daughter. Defendant's admission as to her usage of the plaintiff is that, as

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Best J.

she "did not come out being a female," she "sent for her son-in-law (who, she says, lived in her own father's house) and was paying money to the Circar through him."

Even assuming that plaintiff did live in defendant's house and assisted the defendant after her husband's death, this circumstance would not, I think, be sufficient to constitute him an illatom. There must have been some specific agreement as to his being made an illiatom son-in-law, and plaintiff has tried to prove such agreement, but I concur with the District Judge in disbelieving the witnesses who deposed thereto for the reasons given by the Judge, which need not be repeated here. The District Judge has found it not to be proved that plaintiff's father-in-law "associated plaintiff with himself in the management of the property", and it is extremely doubtful if defendant (a female) could after her husband's death and when plaintiff had already been married to that husband's daughter (defendant's step-daughter) constitute plaintiff an illatom son-in-law. But be this as it may, I am unable to agree with the District Judge in thinking that the mere fact of plaintiff being allowed to live in his father-in-law's house (where it appears plaintiff's adoptive father Jali Reddi was also living at the time) and defendant's employing plaintiff to pay the kist after her husband's death are sufficient to constitute the plaintiff an illatom son-in-law. Further, from the plaint it is seen that it was not as an illatom son-in-law that plaintiff claimed a moiety of the plaint property. Had such been the case there was no reason why he should have confined his claim to a moiety merely instead of the whole, for, even according to his own witnesses, the agreement at the time of the plaintiff's marriage to defendant's husband's daughter was that in the absence of male issue of the father-in-law, plaintiff was to have the whole property. Plaintiff has, it is true, also stated in the plaint that "from the time of his marriage he had illatom rights in the defendant's family." But that was not the case on which he rested his claim. The case was an alleged union between the family of plaintiff's adoptive father Jail Reddi and defendant's husband's father Kodandarami Reddi. It is stated in para 1 of the plaint that Kodandarami Reddi being then a "single man" (*i.e.*, I presume, a widower, as he had a son Venkatasami to whom defendant was subsequently married) and "as the

defendant's husband Venkatasami was young, he was not able to manage the cultivation work, *etc.*, he therefore asked the plaintiff's adoptive father and the latter's father Papi Reddi to come and join his family, and settled that the moveable and immoveable property of both should be united and remain joint, and that, as each had a son, they should divide the property equally, in the event of a division taking place at any future time." It is then stated that the two families accordingly became united and joined their property in one common stock. This is in fact the basis on which the plaintiff brought the present suit and confined his claim to a moiety of the property. It is, however, seen from the evidence of some of plaintiff's own witnesses that Papi Reddi did not at any time live in defendant's husband's house, and that it was only after Papi Reddi's death that plaintiff's adoptive father Jali Reddi went to live with his relation Kodandarami Reddi and as to the alleged mixture of the properties of the two families, the fact proved by the Karnams (one examined as plaintiff's 4th witness and another as defendant's 9th witness) that the patta for Jali Reddi's land stood in his name and on his death was transferred to the name of his widow and subsequently to that of plaintiff, is inconsistent with the alleged union of the two families and mixture of their properties.

I agree with the lower court in finding that there was no such union as alleged in the plaint, and I also find that plaintiff has failed to prove that he has any illatom right in the property belonging to defendant's husband.

Defendant has, in her written statement, admitted plaintiff's right to the lands Nos. 3 and 4 of Schedule A, and defendant's witnesses 1, 2 and 4 deposed to the silver girdle and gold ear-ring, items 54 and 53 of Schedule D, being the property of the plaintiff. He appears to be entitled to none other of the plaint property.

The lower court's decree will be modified by declaring plaintiff entitled to the items mentioned in the last para, and as to the rest of the property claimed the lower court's decree must be affirmed and this appeal dismissed with costs.

Muthusami Aiyar J.—I concur.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Basrur Venkata Row .. .. Appellant* (1st *Prisoner*)

v.

The Crown .. .. Respondent.

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Evidence Act, S 47—Handwriting expert evidence—Probative force of.

There may be cases in which the peculiarities in the handwriting of a person are so numerous and striking and there are so many mannerisms of the forger that he has been unable to avoid in committing his forgery that the court might well come to the safe conclusion on expert evidence alone that a writing is that of a particular person.

Probative force of expert opinion on handwriting evidence dwelt on.

Held, also that in the case before their Lordships that it was unsafe to base a conviction on the expert evidence alone in the case.

Appeal from the sentence of the Court of Session of the South Canara Division in Case No. 19 of the Calendar for 1910.

M. Kunjunni Nair and *G. Annaji Rao* for appellant.

The Public Prosecutor (*C. F. Napier*) for the Crown.

The Court delivered the following

JUDGMENT:—*Sundara Aiyar* J.—The appellant, who was the 1st accused in Sessions Case No. 19 of 1910 in the Sessions Court of South Canara, was tried along with two other persons, the appellant for the forgery, and two others for abetment of the forgery, of certain documents. These documents were certain income tax records in the Udipi Taluq office in the office of the Head Assistant Collector of South Canara. The forged documents related to the assessment to income tax of one Vishnumurti Upadhya for the year 1905-1906. The prosecution alleges that the B. Schedule of income put in by Vishnumurti under the Income-Tax Act, the Takid issued to the Village officers of Gundmi to send a report, the Takid issued to the Patel of Gundmi to communicate to the assessee the order of confirmation of the tax, the deposition of Vishnumurti before the Village officers, the deposition of Venkatatrmana Bhatta (a witness) before them, the list of the houses prepared by the Shanbhog and the report submitted by him to the Tahsildar, were all replaced with forged documents in substitution for the original ones, and

* Cr. A. No. 324 of 1911. 29th December, 1911.

that an interpolation was made in the deposition of Vishnumurti before the Head Assistant Collector after the confirmation of the tax. Three of the above documents were selected as the subject-matter of the charges against the accused, namely, the deposition of Vishnumurti before the Tahsildar, Exhibit B, the B. Schedule put in by him, Exhibit Y, and the interpolation in his statement before the Head Assistant Collector Exhibit H, Exhibit H 1 being the interpolation. These forgeries are alleged to have been made in the interest of one Nagappa Hande. Nagappa was also charged with forgery before the Committing Magistrate but died after his commitment to the Sessions Court. These two persons, Nagappa Hande and Vishnumurti, financed one Tammava Urala in 1897 in a partition suit instituted by Tammaya Urala against his undivided co-parceners. Nagappa obtained a mortgage bond from Tammaya Urala and executed a mortgage himself in favour of Vishnumurti on the 24th March 1898. Nagappa alleged that the mortgage debt due to Vishnumurthi by him was discharged except a small portion. In 1898 Vishnumurti filed a suit in the District Court of South Canara on the mortgage-deed and produced a copy of it. The suit was transferred to the Sub-Court where it was registered as O. S. No. 53 of 1909. According to Vishnumurti and the prosecution case here, Nagappa made no payment whatever towards the mortgage. Nagappa, in support of his plea that the major portion of the debt has been paid off, produced along with his written statement certain correspondence which he alleged passed between him and Vishnumurti in 1898, 1899, 1904, 1905 and 1906, as well as receipts and acknowledgments for payments made by him. Vishnumurti denounced those documents as forgeries. When Vishnumurti was being cross-examined in the Sub-Court as a witness he was shown certain certified copies of income-tax proceedings relating to him and cross-examined with reference to them. He denounced these also as forgeries. They were not filed in the Sub-Court, though the plaintiff Vishnumurti and the Court called upon Nagappa Hande to produce them. Nagappa applied for copies of these income-tax proceedings in February 1909; these certified copies were the documents used at the cross-examination of Vishnumurti. The first accused is alleged to be the writer of these documents. He is a petition writer by profession; the 2nd and 3rd accused were respectively an

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attender of the Head Assistant Collector's office and the record-keeper of the Udipi Taluq office. They are alleged to have helped Nagappa in obtaining the records of these two offices. The Sessions Judge, after a very elaborate enquiry, convicted the 1st accused and acquitted the 2nd and 3rd accused. The 1st accused has appealed to this court from his conviction.

Most of the evidence in the case was adduced for proving that the documents in question, including those which formed the subjects of the charges against the accused, were forgeries. The major portion of the judgment of the learned Sessions Judge is also devoted to the establishment of that proposition. The appellant has not contended before this court that that finding is wrong. The question we have to decide is whether the prosecution has satisfactorily proved that the appellant was the writer of Exhibits B, Y and H. There is no direct evidence on record that the accused was the forger. The conviction is based on the evidence of prosecution witness No. 12, Mr. Charles Hardless, Government handwriting expert, who was examined to prove that these documents are in the handwriting of the accused, and on certain other evidence which was relied on in corroboration of the evidence of prosecution witness No. 12. It will be convenient to examine the corroborative evidence before proceeding to deal with the evidence of the expert.

The facts alleged to corroborate the expert evidence are these:—

(1) that the accused was on intimate terms with Nagappa and used to write documents for him and others connected with him.

(2) that the accused visited Nagappa in January 1909 when, according to the prosecution, the forgeries must have been committed;

(3) that the accused received a considerable sum of money from Nagappa in 1909 and that the latter raised a loan from one Mahabala Rao, prosecution witness No. 37, in January 1909, apparently to be paid to the accused; and

(4) that the accused was a man who used to forge documents as shown by Exhibit YYYYY discovered at a search of his house a paper containing the signatures of certain persons in the handwriting of the accused.

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Assuming that these documents are in the handwriting of the appellant, can the evidence given by Mr. Hardless be taken as sufficient in itself to prove that Exhibits B, Y, and H1, are in the handwriting of accused? His reason for the conclusion arrived at by him is as follows:—" All these writings (*i. e.*, the standard writings given to him for comparison and the disputed writings) are the handiwork of one and the same person. All these writings are of the wrist movement, with the pen-presentation between 45 and 55 degrees of even pen pressure, of regular sizing whether the writings be large or small or wide, of varied direction of linear and oval sometimes inclining to roundness in style of ascendant alignment, of even spacing and of well formed thumb and finger curves." Describing the writing of Vishnumurthi he deseribes it thus:—"Of the superior finger movement, of a pen-presentation of 35 degrees of an even medium pen pressure, of medium sizing, sloping direction, easy execution, close spacing, ascendant alignment, and of ordinary defined finger and thumb curves." It will be observed that with regard to pen pressure, sizing, alignment and finger and thumb curves the witness points to no great difference. The differences no doubt are more prominent in some respects; in the one case it is wrist movement, in the other case superior finger movement. There is also appreciable difference in the angle of the pen-presentation and in the direction. But can it be said that the resemblances between the accused's writing and the disputed writings in these few respects are sufficient to prove with reasonable certainty that the latter are in the handwriting of the accused? In cases where a conclusion was based regarding the authorship of a document on a comparison of writing, the expert was generally able to point to marked peculiarities in the ordinary writing of the accused which are reproduced in the forged documents, the accused being unable to avoid them. No peculiarity or mannerism of such sort is spoken to by Mr. Hardless. DANIEL AMES, in his work on *Forgery*, observes:—" Where a handwriting is brought into question it is rare that any one thing can determine the point at issue. It is usually by a more or less extended series of things, the presence or absence of which creates the decisive preponderance of evidence" (p. 100). At pages 104 and 105 and in the succeeding pages will be found the manner in which experts in the cases mentioned there were

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able to bring home to the court the decided peculiarities which proved the forgery. The learned vakil for the appellant also drew our attention to the fact that in this case all the standard writings were put together and the disputed ones also put together separately and the expert was asked to compare the writings of the one group with those of the other. I by no means doubt that Mr. Hardless carried out his comparison with perfect *bona fides*, but it is unfortunate that the expert knew what the prosecution wished to be proved, and that circumstance must in my opinion detract to some extent from the weight to be attached to the expert's testimony. On reference to KKKKKK it is found that Mr. Hardless before the Committing Magistrate merely deposed that in his opinion the disputed documents were in the handwriting of the accused; he gave no reasons for his opinion. Again I accept Mr. Hardless' *bona fides* as unimpeachable, but the prosecution would have done well to avoid all room for the observation that the witness committed himself at the preliminary enquiry to an opinion given without reasons and then gave reasons for them at the trial before the Sessions Court. He does not say that the handwriting of the accused is in any way peculiar or eccentric, a circumstance which would attach particular weight to evidence of comparison. I am unable by the application of any facts stated in the expert's evidence as to the writings before the court to come to the conclusion that Exhibits B, Y and H1 are in the handwriting of the accused. In *Lalla Prasad* v. *King Emperor*[1] Pandit *Sunder Lal*, Additional Judicial Commissioner of Oudh, refused to convict the accused on the uncorroborated evidence of the handwriting expert who happened to be the same as in the present case. The learned Judge found that the corroborative evidence in the case was valueless in that there was no marked peculiarity in the handwriting of the accused or anything rare in its style. The learned Judge quotes the following passage from Dr. Lawson's work on the "Law of Expert and Opinion Evidence": "The evidence of the genuineness of the signature based upon the comparison of handwrting and of the opinion of expert is entitled to proper consideration and weight. It must be confessed, however, that it is of the lowest order of evidence or of the most unsatisfactory character. We believe that

1. (1911) 11 Cr. L. J. 114.

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in this opinion experienced lay men unite with the members of the legal profession. Of all kinds of evidence admitted in a court this is the most unsatisfactory. It is so weak and decrepit as scarcely to deserve a place in our system of jurisprudence." This passage possibly states in too depreciatory terms the value of expert evidence. I am quite prepared to concede that there may b cases in which the peculiarities in the handwriting of a person are so numerous and striking and there are so many mannerisms of the forger that he has been unable to avoid in commiting his forgery that the court might well come to the safe conclusion on expert evidence alone that the writing is that of a particular person. But no help of this kind is afforded us in this case by Mr. Hardless. Again, this case must be distinguished from those where several independent experts have arrived at the same conclusion by their independent efforts. Pundit *Sunder Lal* J. refers to two judgments of the Allahabad High Court—*Srikant* v. *King-Emperor* [1] and *Kalicharan Mukerji* v. *King-Emperor*[2]. In the former case *Blair* and *Knox* JJ. observe that "to base a conviction upon the evidence of an expert in handwriting is, as a general rule, very unsafe" and in the second case Justices *Richards* and *Griffin* approved of the above observation. In the second case no doubt there were improbabilities arising from the circumstances of the case in the story for the prosecution, but the observations of the learned Judges with regard to the value of expert evidence are none the less valuable. I have no hesitation in the present case in refusing to find the accused guilty on the evidence of prosecution witness No. 12 alone without substantial corroboration. I would therefore reverse the conviction of the accused and direct that he be released from custody.

Spencer J. :—I agree with my learned brother in thinking that this is not a case in which a conviction can be supported upon the uncorroborated testimony of the handwriting expert, and the corroborative evidence available on the record against the 1st accused is of the weakest description, and in fact does little more than create a certain amount of suspicion that he may have had a hand in the forgeries.

I consider the present case to be one in which it would be dangerous to act on the uncorroborated evidence of the handwriting expert. The conviction of the 1st accused must be set aside and his release ordered.

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1. (1904) 2 A.L.J. 444.

2. (1908) 6 A. L. J. 184.

In re a vakil

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Ayling.

In re Mr. G. Krishnasawmi Aiyar, a Vakil of the High Court.*

Professional misconduct—Vakil—Duty of vakil to client and court—Dismissal of case for default—Untrue statements of vakil's clerk to client—Vakil's responsibility.

When a vakil fails to appear when his case is called on and the case is dismissed for default and an in justice is done to the client thereby, the onus is heavy on the vakil to explain the true state of affairs to the court and to his client. It is desirable that he gives his explanation to the court at the earliest opportunity; and as regards the client it is his duty to see that the real circumstances in which the case was dismissed are brought to his knowledge.

Held also that the vakil should be held responsible for the untrue statements of his clerks to the client regarding the disposal of the case in the circumstances of the case.

The practice of Vakils' clerks being allowed to write letters on behalf of their masters without the masters' knowledge reprobated as unbusiness-like.

The Advocate-General (P. S. Sivaswami Aiyar) in support of the application.

T. Rangachariar and *K. Srinivasa Aiyangar*, Vakils for the said Vakil.

L. A. Govindaraghava Iyer on behalf of the Vakils' Association.

The undermentioned notice was issued to the Vakil under S. 10 of the Letters Patent on 5th January 1912:—

Whereas on the disposal of C. M. P. No. 498 of 1910, a copy of the order which is annexed hereto, this court has by its proceedings dated 3rd January 1912 directed that a notice be issued to you to show cause why you should not be removed or suspended from practice as a vakil of this court or be otherwise dealt with for your unprofessional conduct in S. A. No. 1045 of 1907: you are hereby directed to appear on the 17th January 1912 in person or by counsel to show cause why you should not be dealt with accordingly.

* 29th February, 1912.

The Advocate-General dealt with the facts leading to professional misconduct on the part of the Vakil. They are fully set out in the Judgment. He submitted that they showed gross negligence in every way almost amounting to fraud and that accounts had been tampered with. *In re a vakil.*

T. Rangachariar cited CORDERY on *Solicitors*, 180. Dishonourable conduct, he said, will entail a disbarring. Professional misconduct does not mean gross negligence and things of that kind; it means conduct implying moral infamy. There is nothing to conect the vakil with the clerk's misdoings either in the matter of writing letters to the clients or of keeping the accounts. The vakil, it is true, did not mention to the court about the dismissal for default. Dishonourable conduct must be *proved* and not merely gross negligence—Re. *G. Mayor Cooke (a solicitor)*[1]; *In the matter of a Solicitor.*[2]; *In re. Shaik Ameeroodeen*[3]; *In re. Stewart*[4]; *Lubeck's case*[5]; *In the matter of Babu Nirajan Prosad Mohanty*[6]; *In re. Maganlal Chowdri*[7]; *In re. Purna Chandra Pal*[8]; *Marsh* v. *Joseph*[9]; *In re. Sreenath Roy*[10]; *In re. Wallace*[11]; *In re. Newton*[12]; Re. *A Solicitor* exparte *Incorporated Law Society*[13] (a case where money belonging to a client was retained by a solicitor in spite of repeated demands). The vakil has already been made to pay the costs of both the petitioner and of the respondent when the second appeal was restored to file.

The Advocate-General replied on facts.

The Court passed the following

ORDER :—In this matter a vakil of this court has been called on to show cause why he should not be suspended or removed from practice by reason of his conduct in connection with S. A. No. 1045 of 1907 in which he was retained for the appellant. Notice was issued to the vakil in pursuance of an order made by this court with reference to the finding in the judgment in Civil Miscellaneous Petition No. 498 of 1910.

1. (1889) 33 Soli. Jour. 397.
2. (1891) 36 Soli. Jour. 80.
3. (1866) 6 W. R. Mis. 5, 8, 11, 12.
4. (1863) 10 W. R. P. C. 43.
5. (1905) I. L.R. 33 C. 151 (P.C.)
6. (1908) 12 C.W.N. 919.
7. (1907) 9 Bom. L. R. 866.
8. (1899) I. L. R 27 C. 1023.
9. (1897) 1 Ch. 213, 246
10. (1872) 17 W. R. 405.
11. (1866) L. R. 1 P. C. 283.
12. (1871) 17 W. R. 35, 38.
13 (1895) 39 Soli. Jour. 202.

In re a vakil.

The application is made by the Advocate-General, and the question we have to consider is whether reasonable cause, within the meaning of S. 10 of the Letters Patent, has been shown for removal or suspension of the vakil.

On the hearing of the application Mr. Rangachariar and Mr. K. Srinivasa Aiyangar appeared for the vakil. We have considered the judgment of this court in C. M. P. No. 498 of 1910. Two affidavits have been relied upon by the vakil, one in support of the application to restore the second appeal dated 14th February 1910 and another dated 6th December 1911. There are also affidavits by the vakil's manager Lakshmiah, and his clerk Bashyam. An unsworn statement by the vakil was handed to us. We have considered this statement, though as it is not on oath and the vakil is represented before us, we were under no obligation to do so. We are anxious, however, that any point which may tell in favour of the vakil should not be overlooked.

The facts are as follows:—

A bill for printing the pleadings in the appeal, amounting to Rs. 48, was issued by the court in November 1907. Several applications for payment made to the client by the clerk Lakshmiah were not attended to.

On or about May 5th, 1908, a bill for printing documents amounting to Rs. 60 was issued. Further letters to the client demanding payment were written by or on behalf of the vakil.

On or about January 6th, 1909, the client sent to the vakil a money order for Rs. 40.

On March 5th, 1909, the appeal was posted for dismissal by reason of the non-payment of the printing charges. Time for payment was extended by two weeks and the bill was reduced from Rs. 108 to 68. On that day the client paid Rs. 28 to the vakil. The vakil states that the client was present when the order was made for the extension of time and for the reduction of the bill. He also states—and we accept the statement—that although the client had paid Rs. 68 to the vakil, the vakil had only some Rs. 54 or 55 to the credit of the client as he had made some small payments in connection with the appeal out of his own pocket.

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On March 15th, 1909, Lakshmiah wrote to the client as follows: "Received the letter written by you and learnt its contents. When you were here the printing bills were amended and it was found that Rs. 48 had to be paid for one bill and Rs. 20 for the other; up till now, exclusive of the sum of Rs. 40 you sent to Iyer, you paid me Rs. 28 and went away. On my now asking Iyer for the money he said that the money received by him from you was spent and asked me to get the money from you and pay Rs. 40 for the bill. Therefore as soon as you see this letter, remit to my address Rs. 40 by money order, and then attend to other affairs. If you fail to send, the case will be spoiled and there wlll be no use in blaming us." Lakshmiah says in his affidavit that he wrote this letter on his own responsibility so as to be on the safe side, and that, so far as he remembers, he had no such conversation with his master as is stated in the letter. The letter is headed with the name of the vakil and with his office and private address. It is signed by Lakshmiah.

The letter is a most extraordinary one. It gives no particulars of the alleged spending of the client's money and demands another Rs. 40. The vakil repudiates all knowledge of this letter and he says it was not until the 25th of January, 1910, that he came to know that the client's printing charges had not been paid.

What action, if any, the client took on receipt of this letter of March 15th we do not know, as the letters written by the client to the vakil or his clerks have not been produced. It is not suggested that the demand for payment of a further Rs. 40 was complied with. On July 15th, 1909, the clerk Bhashyam wrote to the client, after referring to letters written by the client: "Your appeal is being printed. We shall let you know the date of hearing."

On July 17th the same clerk wrote again, after referring to letters written by the client: "The papers in the said appeal are being made ready. You need not in any way be anxious. We shall let you know if there be anything particular."

On January 26th, 1910, the appeal was posted for dismissal for non-payment of printing charges.

In re a vakil.

No one appeared for the appellant and the appeal was dismissed for default. Two days later, on January 28th, 1910, the clerk Bhashyam wrote to the client as follows:—"Your second appeal referred to above was posted on the 26th instant for hearing and decided against us, *i.e.*, the appeal was dismissed." This letter is headed with the name and address, business and private, of the Vakil, and is signed "By order—Bhashyam." The vakil says in his affidavit that this letter was written without his knowledge. Bhashyam, the clerk, says in his affidavit that he understood from the manager Lakshmiah that the case had been dismissed but that he did not know the details. The manager Lakshmiah in his affidavit says nothing about it.

The vakil did nothing until his client appeared on the scene and put in an application for restoration on February 14th, 1910. The application to restore is signed by another vakil, Mr. G. S. Ramachandra Iyer, as well as by the vakil whose conduct is the subject of this enquiry. In support of the application to restore the appeal the vakil put in an affidavit. The affidavit is as follows:—

"I, G. Krishnaswami Iyer, son of P. S. Ganapathi Iyer, a Hindu Brahmin of the age of about 34 years, High Court Vakil, residing at No. 3, North Tank Square, Mylapore, Madras, do hereby solemnly and sincerely affirm and say as follows:—

"1. That I am the vakil for the appellants herein.

"2. That Viswanatha Chetti, one of the appellants herein, paid my clerk V. Lakshmiah a sum of Rs. 28 on or about the 5th March 1909 for paying the printing charges hereof; he had sent me also a sum of Rs. 40 by money order towards the expenses of this appeal on or about the 6th January 1909 after the time for the bill had expired.

"3. That by mistake my clerk V. Lakshmiah entered the said amounts paid by the appellants to the credit of a different second appeal from the same South Arcot District, *viz.*, S. A. No. 49 of 1907, and the printing charges of this appeal were not paid.

"4. That this case was posted on the evening of the 25th January 1910 for order under Rule 100-A of the Translation and Printing Rules, and my clerk Bhashyam Iyengar brought it to my notice then; I had a recollection that the party had paid the

printing charges after time and that time had been extended by the court, and on looking over the account I found that a mistake had been committed. I wanted to bring this matter to the notice of the court on the 26th January 1910 and on that day this case was posted as the 4th case in the list.

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" 5. That on the 26th day of January 1910 I had 3 fresh small cause suits posted before His Honor the Third Judge, Small Cause Court, for trial, and two original suits Nos. 208 of 1908 and 199 of 1908 before his Lordship Justice Wallis.

" 6. That as this case was the 4th case in the list I waited for a few minutes at my chambers, made some arrangements for the Small Cause Court work, and went to the Original Side to see when my said original cases were likely to be reached and then came to this court.

"7. That when I reached the doors of this court it was about a few minutes after this case had been called on and dismissed for default."

The statement in paragraph 3 of the affidavit that the amounts paid by the appellants were by mistake credited to a different S. A. is admittedly inaccurate. The books only purport to show that Rs. 40 was so credited.

According to the vakil's own case, by a mistake of his clerk, moneys paid by the appellant in S. A. No. 1045 of 1907 were credited to another client and as a result of this mistake the appeal was dismissed for default. The case was posted not on account of any default of the client but on account of a mistake, or something worse than mistake, in the office of the vakil.

In this state of things the onus was heavy on the vakil to explain the true state of affairs to the court and to his client. So far as the court is concerned he does nothing. His failure to be in court when the case was called on may have been accidental. But one would have thought in a case where a grave injustice had been done to his client by a mistake in his office of which the vakil was personally aware, he would have been specially careful to attend and explain how things stood. It was a duty which he owed to the court. It was a duty which he owed to his client, who had suffered a serious injustice. It was a duty which he

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owed to himself since the mistake might well give rise to questions involving the personal honesty of the vakil or his clerks. There may be an explanation of the vakil's failure to appear. It seems to us there can be no satisfactory explanation of his conduct in not bringing the matter before the court at the very earliest opportunity.

In our opinion the *gravamen* of the charge is not that the vakil failed to appear when the case was called on (this, as we have said, may have been an accident) but that having failed to appear and the appeal having been dismissed, he did not give a full explanation to the court at the earliest opportunity. His excuse that he was under the impression that he could not mention the facts till the same Bench sat again seems to us to be idle.

As regards the client, whatever may have been the practice of the vakil's office as to allowing his clerks to write letters which did not come before him, the vakil seems to have entirely misconceived the nature of his duty and responsibilities in not taking steps to see that the real circumstances in which the appeal had been dismissed were brought to the knowledge of his client. He did nothing until the client appeared upon the scene. To make matters worse, the letter of January 28th to which we have referred was written by the clerk Bhashyam. This letter is a deliberate lie. The object with which it was written was obviously to deceive the client and make him think there was nothing more to be done. We cannot shut our eyes to the fact that if this letter had accomplished the object with which it was written, the clerk or the vakil might have got the benefit of the client's money and nothing more would have been heard of the case. The suggestion that the object of the clerk in writing the letter was to "gain time" is not worth serious consideration. As regards the accounts, all we need say is that there are very strong reasons to suspect that the day-book and the ledger have been altered in order to support the case that Rs. 40 were credited to the wrong second appeal.

On January 17th, 1910, the clerk Bhashyam wrote: "S. A. 1045 of 1907 * * I have written to you on several occasions that the sum of Rs. 40 sent for the printing charges in connection with the above case is insufficient."

This goes a long way to show that the suggestion that the Rs. 40 had been credited not to appeal 1045 but to appeal 49 was an after-thought and that the entries in the books which bear date January 6th, 1909, had not been made when the letter of January 17th, 1909, was written. The way in which the credit of Rs. 40 in appeal 49 is entered in the day-book strongly suggests that it was made at some time after the date which it purports to bear. Lakshmiah's letter of 15th March, 1909, and Bhashyam's letters of July 15th and 17th July, 1909, are all inconsistent with the suggested mistake. The fact that after July, 1909, no further efforts were made to get money from the client, although the case was not posted for orders till January, 1910, is also inconsistent with the suggestion.

In the statement which has been handed to us the vakil states that Rs. 68 was refunded to the client in February 1910. This payment does not appear in the ledger, but we find in the day-book under date February 16th, 1910: "To client in S. A. 1045 of 1907 Rs. 75."

This was after the client had come to Madras and the application for restoration had been put in.

The letters of March 15th, 1909, and January 28th, 1910, were written by Lakshmiah and Bhashyam, respectively, on paper headed with the vakil's name and address. The vakil tells us, in effect, that these letters were written without his knowledge or approval. It was suggested that there was nothing unusual in this. If a practice of vakils' clerks being allowed to write letters on behalf of their masters without their masters' knowledge really exists, it seems to us that that the practice is altogether unbusiness-like. The letter of January 28th, 1910, contains a false statement—a false statement, as it seems to us—made deliberately with a definite object in view. The vakil cannot protect himself from responsibility by saying he knew nothing about this letter. We must hold him responsible for it. If this letter was in fact written with the vakil's knowledge and approval, the case would be an extremely bad one. We assume, in his favour, that what appear to be the obvious alterations in the books, made, as it seems to us, with the object of supporting the very doubtful story as to the Rs. 40 having been credited to the wrong S. A. by mistake, were made without the knowledge of

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the vakil. There remains the fact that when the appeal was dismissed for default in circumstances which made it the duty of the vakil to offer a prompt and full explanation to the court and to his client, he did nothing till his client appeared on the scene. He did not write to the client himself. He gave no instructions to his clerk to write. The matter was one of special delicacy and importance, and, in our opinion, it was the duty of the vakil either to give express instructions to his clerk in the matter or to satisfy himself that any communication which his clerk sent to the client was a true statement. As we have said the clerk's statement was untrue and we must hold the vakil responsible for it. We cannot take the view that the facts show nothing more than negligence on the part of the vakil and we do not think his conduct can be excused on the ground of want of experience or ignorance of practice.

The order of the court is that Mr. G. Krishnaswami Ayar, a vakil of this court, be suspended from practice for 6 months fom this date.

[We publish below the civil miscellaneous petition out of which this case arose :—ED.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Muruga Chetty and others .. Petitioners*
(*Appellants in S. A.* 1045 *of* '07).

v.

Rajasami and others ... *Respondents*

Muruga Chetty *v.* Rajasami.

Pleader and client—Relations between—'Agency' principle of, how far applies—Pleader's responsibility for clerk's conduct—C. P. C., O. XLI, rr. 17, 19 (*O. C., Ss.* 558, 556)—*Restoration of appeal dismissed for default—Gross negligence of pleader—Client's remedies—Court's discretion—Suit for immoveable property—Right acquired by respondent in appeal dismissed for default, nature of—Words—"Attend"—"Appear."*

No pleader can be permitted to completely abandon to his clerks the discharge of his duties to his clients, and in any event the vakil must bear the full responsibility for the acts and faults of his clerks. In the eye of the law at least, he is responsible for the fraud perpetrated by his clerks on his client.

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* C. M. P. No. 498 of 1910. 3rd January 1912.

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Under the Code of 1908 a court has power to restore an appeal dismissed for default even where the appellant is not able to prove that he was prevented by sufficient cause from appearing when the appeal was called on for hearing. If the respondent has been so affected in the meanwhile that he cannot be restored to his former position, that may be a ground for refusing restoration. The discretion vested in the court would enable it to deal with any proper objections that the respondent may urge against restoration.

A pleader is not altogether a private agent engaged by a party, and the doctrines of agency should not be applied without reservation to a pleader. When the court has any control over the pleadings and when the act of the pleader is not one done entirely out of court it is not proper to bind the client absolutely by the pleader's act. It may be that a client would not be entitled to relief against his opponent merely because his pleader in the actual conduct of the case was guilty of negligence in adducing evidence or in arguing the case or otherwise, in consequence of which the judgment went against the client. But the same thing will not hold good in the case of the failure of the pleader to appear at all for his client.

The court is not bound to restore an appeal in every case where non-appearance is imputable to the pleader's negligence but may in its discretion leave him to his remedy against the pleader by an action for damages. But where the negligence in the case of the pleader was so gross as to amount to fraud, the evidence showing a design on the part of either the vakil or his clerks to do nothing for the client and to appropriate his money, and the suit was one relating to immoveable property instituted by the appellant on behalf of himself and other persons under leave of court:— *Held* that it was a proper case for restoration of the appeal.

The relations between a pleader and his client dwelt on.

The theory of the acquisition of a right by the respondent by the very dismissal of an appeal for default commented on.

Per *Spencer* J. :—The difference between the meaning of the words "appear" and "attend" in Ss. 558 and 556 of the Code of 1882, O. IX, r. 1, of the Code of 1908 and O. XLI, rr. 17 and 19, dwelt on.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the restoratioin to file of S. A. No. 1045 of 1907 presented from the decree of the District Court of South Arcot in A. S. No. 355 of 1906 (presented against the decree of the Court of the District Munsif of Chidambaram in O. S. No. 1014 of 1905) which was dismissed by this court for default of prosecution on the 26th day of January 1910.

T. Rangachariar, *G. Krishnasami Aiyar* and *G. S. Ramachandra Aiyar* for petitioners.

T. R. Ramachendra Aiyar for the 3rd respondent.

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T. Rangachariar.—The affidavits show mistake and negligence on the part of the clerks of the vakil for which the party ought not to suffer.

T. R. Ramachandra Aiyar.—Negligence of a vakil is no excuse for restoring a case dismissed for default of appearance. *Llyod* v. *Grace*[1] (a case of a solicitor's clerk.) I have acquired a right by the dismissal of the case. [*Sundara Aiyar* J.—Such a thing can be said in the case of an appeal which is barred by limitation. It is not only the default of the party but other grounds also may be good grounds for restoration—*Somayya* v. *Subbayya*[2]]. This case has been dissented from in this High Court and in Bombay in *Ismail Ibrahim* v. *Haji Jan*[3]. As non-appearance is the ground of dismissal 'the sufficient cause' must be one explaining non-appearance. Other kinds of excuse cannot avail in this case—23 *American Cyclopædia*, p. 939 (under the heading of Mistake, Negligence or Misconduct of Counsel in the article on Judgments); *Flower* v. *Gedyl*[4]; *Burgoine* v. *Taylor*[5]; *Beldams Patent, in re*[6]; *Raj Narain* v. *Akroor*[7]; *Manilal* v. *Girlam*[8]; [*Sundara Aiyar* J. —This case assumes that the solicitor and party stand on the same footing.] *Poyees* v. *Minors*[9]; *Rampertab* v. *Jakeeram*[10] (approving the Bombay case). Vide also *Oriental Finance Corporation* v. *Mercantile Credit and Finance Corporation, Ltd.*[11].

G. S. Ramachandra Aiyar.—There is negligence of the vakil. But there is also the negligence of the clerks. The case may be restored for negligence of the vakil—BLACK on *Judgment*, Vol. I, p. 34; 23, *American Cyclopædia*, pp. 941, 942. The principle of agency ought not to be applied to practitioners—Order XXXVI, rr 32 and 33, of the Judicature Act; BEAVAN on *Negligence*, p. 1174; *Neale* v. *Gordon Lennox*[12], 1910 Annual Practice 520, quoting *Birch* v. *Williams*[13] (illness of counsel); *Anundmoyee* v. *Poorno*[14]. *Oriental Finance Corporation* v. *The Mercantile Credit and Finance Corporation, Ltd.*[11] says that the vakil may be made to pay the costs personally.

1. (1911) 2 K.B. 489.
2. (1903) I.L.R. 26 M. 599.
3. (1908) 10 Bom. L.R. 904.
4. (1857) 53 E.R. 177.
5. (1878) L.R. 9. Ch. 5.
6. (1911) 1 Ch. 60.
7. (1875) 24 W.R. 141.
8. (1888) I.L.R. 13 B. 12.
9. (1881) 7 Q.B.D. 329, 333.
10. (1896) I.L.R. 23 C. 991.
11. (1866) 2 Bom. H.C.R. 282.
12. (1902) A. C. 465, 473.
13. 24 W.R. (E) 700.
14. (1861) 9 M.I.A. 26, 32.

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There is a difference between the wording of the English Order and that of the present C. P. C.—*Kailash Chunder Das* v. *Rama Nath*[1] (illness of pleader's clerk); *Narain Singh* v. *Bheurab Churn Panda*[2]; *Maharaja of Vijianagaram* v. *Lingam*[3]; *Somayya* v. *Subbamma*[4] (minority being a sufficient cause). The principle of notice to an agent being treated as notice to the principal ought not to be applied in the case of a fraud by a solicitor—KERR ON *Fraud* p. 280; *Gopal Row* v. *Maria Susaya Pillai*[5] (generous construction). If minority is a good ground the fact that the suit is a representative one is also a good ground.

The Court delivered the following

JUDGMENTS:—*Sundara Aiyar* J.:—This is an application by the 2nd appellant in S. A. No. 1045 of 1907 for the restoration of the second appeal, setting aside the order of dismissal for default passed on the 26th January 1910. The case was posted for orders under Rule 100 (*a*) of the Appellate Side Rules of Practice as the appellant had failed to pay the charges for printing the papers in the case. The appellant did not appear either in person or by pleader when the appeal was called on for hearing on the morning of the 26th January, and it was dismissed for default with the 3rd respondent's costs, by *Munro* and *Krishnaswami Aiyar*, JJ. The application for restoration was put in on the 14th February 1910. As the 3rd respondent opposes the restoration of the appeal, we have gone fully into the circumstances under which the appeal was dismissed. The appellant has put in an affidavit on which he relies to show that he was prevented by sufficient cause from appearing at the hearing of the case and, if we should hold against him on this point, that he is otherwise entitled to have the appeal restored. In that affidavit he says that he had sent the necessary funds to his vakil, G. Krishnaswami Aiyar, for the payment of the printing charges and that the failure to pay the same was not due to any default on his part. In other words, he lays the blame for the non-payment on his vakil. Two affidavits have been put in by the vakil and two by his clerks, Lakshmiah and Bhashyam, respectively, and they disclose a remarkable state of circumstances.

1. (1897) 2 C.W.N. 414.
2. (1881) 8 C.L.R. 350.
3. (1902) 12 M.L.J. 473.
4. (1903) I.L.R. 26 M. 599.
5. (1906) I.L.R. 30 M. 274, 276.

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Sundara Aiyar J.

No money was paid towards printing charges in the case by the vakil. The client had sent a money order to the pleader for Rs. 40 early in January 1909. The case was posted for orders on the 5th March 1909. Owing to non-payment of the charges, the time for payment was extended for two weeks from that date. The client paid on that date Rs. 28 to his vakil. Lakshmiah, one of the clerks, wrote to the appellant on the 15th March 1909 as follows:—"Received the letter written by you and learnt its contents. When you were here the printing bills were amended and it was found that Rs. 48 had to be paid for one bill and Rs. 20 for the other; up till now exclusive of the sum of Rs. 40 you sent to Aiyar, you paid me Rs. 28 and went away. On my now asking Aiyar for the money, he said that the money received by him from you was spent and asked me to get the money from you and pay Rs. 40 for the bill. Therefore, as soon as you see this letter remit to my address Rs. 40 by money order, and then attend to other affairs. If you fail to send, the case will be spoiled and there will be no use in blaming us". The letters written by the appellant to the vakil or his clerks have not been produced. On the 15th July 1909 the clerk Bhashyam wrote to the appellant as follows:—"Received your letters. I did not write any reply as the court closed for two months. Your appeal paper is being printed. We shall let you know the date of hearing". Again, on the 17th July 1909 the same clerk wrote thus:—"Your letter was received. The papers in the said appeal are being made ready. You need not in any way be anxious. We shall let you know if there be anything particular."

It would thus appear that after Lakshmiah's letter of the 15th March 1909 the client was not pressed to send any more money It may be observed that the whole amount of Rs. 68 paid by the client was intended for the printing charges. The vakil tells us that he was appearing in the case without any remuneration. The appeal was dismissed for default, as already mentioned, on the 26th January 1910. On the 28th, Bhashyam wrote as follows: —"Your second appeal referred to above was posted to the 26th instant for hearing and decided against us, that is, the appeal was dismissed."

It is quite clear from the letters referred to above that the client was informed by the vakil's clerks that his case was going

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on all right, and that he was finally informed that it was decided against him. He never had the slightest intimation. that the printing charges were not paid, or that the appeal was dismissed for default of appearance. From what was stated before us by the appellant's vakil it would appear that no further letter was written to the client, but he himself went over to Madras to put in an application for restoration on the 14th February 1910 and engaged another Vakil, G. S. Ramachandra Aiyar, along with Mr. G. Krishnasawmi Aiyar. The latter put in an affidavit dated the 14th February 1910, in which he acknowledges the receipt of the two sums of Rs. 40 and Rs. 28 from the appellant and says: "My clerk V. Lakshmiah entered the said amounts paid by the appellants to the credit of a different second appeal from the same South Arcot District, namely S. A. No. 49 of 1907, and the printing charges of this appeal were not paid. This case was posted on the evening of the 25th January 1910, for orders under Rule 100 (*a*) of the Translation and Printing Rules, and my clerk Bhashyam Iyengar brought it to my notice then; I had a recollection that the party had paid the printing charges after time and that time had been extended by the court and on looking over the account I found that a mistake had been committed. I wanted to bring this matter to the notice of the court on the 26th January 1910 and on that day this case was posted as the fourth case in the list. On the 26th January 1910, I had three fresh small cause suits posted before His Honor, the Third Judge of the Small Cause Court, for trial and two original suits No. 208 of 1908 and 199 of 1908 before his Lordship Justice Wallis. As this case was the fourth case in the list, I waited for a few minutes in my chambers, made some arrangements for the Small Cause Court work and went to the Original Side to see when my said original cases were likely to be reached and then came to this court. When I reached the doors of this court, it was about a few minutes after this case had been called on and dismissed for default."

The three cases posted above S. A. No. 1045 of 1907 were also cases posted for orders on account of non-payment of printing charges. Practitioners of the courts are well aware that such cases cannot be depended upon to take any time. A reference to the cause list of the day shews that this case was reached at 11-8 A.M. I have no doubt that it was the duty of

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the vakil either to appear in court when the case was reached or to arrange for the appearance of some other vakil on his behalf. I cannot hold that there was any good excuse for his failing to do so. If the failure of the vakil to appear without reasonable excuse be regarded as not sufficient reason for refusing to restore the second appeal, this application must be dismissed.

But it is contended on the appellant's behalf that the facts proved show that the vakil's clerks were guity of culpable negligence and fraud against him and that the vakil himself was guilty at least of gross negligence and that the fraud of the clerks must be regarded in law as his own fraud. His vakils stated that, having placed the facts before us, they left it to us to say whether the vakil himself, personally, was guilty only of negligence or also of something worse, that is fraud.

Mr. T. R. Krishnaswamy Aiyar, who appeared for the 3rd respondent on the 26th January 1910 when the case was dismissed and before us again along with Mr. T. R. Ramachandra Aiyar, has put in an affidavit in which he says "shortly after the case was dismissed I came out of the court and met Mr. G. Kishnaswami Aiyar, the vakil for the appellant, and he asked me what had become of the case. When I told him that it was dismissed with costs he said that he was sorry that it was dismissed in his absence. I then told him that I would go with him to the court if he wanted and that he might tell their Lordships if he had any thing to say. In reply to that he said words to the following effect: "that his client was a bad fellow, that he did not send him money or do anything else, and that he did not care to do anything." This affidavit was made on the 5th December 1911. But Mr. Krishnaswami Aiyar had stated these facts in court when the petition came on for hearing on a previous occasion after notice to the respondent. We had intimated that it would be desirable that the statement should be made on oath. Mr. G Krishnaswami Aiyar has put in an affidavit denying that he made the statements above referred to in Mr. T. R. Krishnaswamy Aiyar's affidavit. Mr. G. Krishnaswamy Aiyar says that what he told Mr. T. R. Krishnaswamy Aiyar was, in his own words, "that I had experienced considerable trouble in getting the client to pay printing charges for a long time and that there was a mistake in my office in not paying the printing charges; while I was

saying so, I was going to the court. Mr. Krishnaswami Aiyar went away and there was no conversation between us to the effect set out in paras 3 and 4 of his affidavit. I apprehend that Mr. Krishnaswami Aiyar must have misunderstood my statements made hurriedly or did not catch them correctly and exactly." Mr. G. Krishnaswami Aiyar then goes on to say that Mr. T. R. Krishnaswami Aiyar had made himself acquainted with the contents of his previous affidavit about the end of 1910 and no counter-affidavit was filed in the case until long after.

Now, when a vakil happens to be unable to appear in a case when it is called on for hearing owing to his being engaged in another court and the case is dismissed for default of appearance, he usually takes the earliest opportunity the same day to make a statement of the circumstances to the Bench hearing the case. Mr. G. Krishnaswami Aiyar admittedly did not do so, and no application for restoration was put in for nearly 20 days afterwards. In the meanwhile the client had been given untrue information that the case was decided against him on the merits, and the presentation of the restoration petition was due to the steps taken by the client himself, who subsequently went to Madras for the purpose. These circumstances fully corroborate the statement of Mr. T. R. Krishnaswami Iyer and throw suspicions on the conflicting account given by G. Krishnaswami Iyer. Apart from any corroboration, I may say that I have no hesitation in accepting the statements of Mr. T. R. Krishnaswami Iyer as true. His affidavit shows that he is stating facts which apparently made an impression on his mind, and it is unlikely that it could be due to misunderstanding or mistaken memory. The letters of Bhashyam, already referred to, show that the client was informed that his papers were being printed when such was not the case. Bhashyam says in his affidavit that he wrote the letters of the 15th and 17th July "under the impression that, as it was a pending case, the printing must be going on and as I did not know that the printing charges in this case had not been paid. Mr. Lakshmiah was in charge of the money and the accounts of the office." The letters were written in answer to the appellant's letters, but the clerk says that he wrote his letter from pure imagination without making any reference to the facts. Lakshmiah says with reference to his letter of the 15th March, in which he had said that the vakil told him

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that the amount of Rs. 40 first paid by the client had been spent; that he said so on his own responsibility, and that his statement about what the vakil told him was untrue, and that he really had no such conversation with the vakil as is set out in the letter. Apparently the demand for more money was subsequently dropped. Bhashyam says in his affidavit that he wrote the letter of the 28th January 1910 stating that the appeal was decided against the appellant, without knowing why it was dismissed. He says he intimated the result as he understood it from Lakshmiah. Lakshmiah does not corroborate him by saying that he made any statement as to how the case was disposed of. Both the clerks say that their master does not attend to correspondence. Lakshmiah states that he looked after and supervised the general work of the office and that the vakil used to leave all the matters in the office to him and he would take the vakil's signatures only when he thought it necessary to impress the client with the importance of the matter contained in any particular letter. The vakil also says that he left all Appellate Side matters and correspondence to his manager Lakshmiah. He adds that he became aware of the letters of the 15th March 1909, the 15th July 1909, the 17th July 1909 and the 28th January 1910, only on the 5th December 1911 when he saw them in the hands of Mr. G. S. Ramachandra Aiyar. With regard to the non-payment of the printing charges, the account given is that the clerk Lakshmiah incorrectly credited the amount of Rs. 40 to another second appeal, No. 49 of 1907. But this cannot be reconciled with a letter dated the 8th January 1909, signed by Bhashyam, in which he acknowledged the receipt of Rs. 40 from the appellant, although it is now stated that the amount was credited to another person on the 6th January 1909. Nor is it consistent with Lakshmiah's letter of the 15th March 1909 or Bhashyam's letter of the 15th and 17th July 1909, or with the fact that after July 1909 no further efforts were made to get money from the appellant, although the case was not posted for orders till January 1910. How the mistake happened to be committed is not explained. The case to which credit is said to have been given was S. A. No. 49 of 1907, and that for which payment was made was Second Appeal No. 1,045 of 1907. The name of the client in the former case was Viswanatham Chetty while the client in the latter was Krishnaswami Pillay. There was no such similarity

either in the numbers or in the names of the clients as would ordinarily lead to a mistake of the one for the other. The vakil's day-book and ledger have been put in to prove the mistake made. But the entries appear to be suspicious. The total in the day-book at the end of January 1909 shews clear marks of alteration by changing '1' into '5' in the middle number of the figure so as to show an increased receipt of Rs. 40. The totals at the end of each page also appear suspicious. The entry of 'Rs. 40' is made on the first line of the page on which it appears, but we observe that the first line of each page is generally blank, except where it is used to denote the amount carried over from the previous page. or are we satisfied with the genuineness of the entry in the ledger relating to the client in Second Appeal No. 49 of 1907. Mr. G. Krishnaswami Aiyar agrees that the entry at the end of January in the day-book appears suspicious. He says he has never examined his account books. He has a press copy book containing copies of letters sent to clients, but he tells us, as already noted, that he was not aware of the letters written to the appellant by his clerks and filed in evidence in this petition until the day previous to the date of his second affidavit. His account, therefore, is that he knows nothing either of the accounts or of any letters written to his clients or of the business done by his clerks in his cases on the Appellate Side. The only thing he was aware of in this case was that on the 25th January 1910, when the case was posted for orders, he told one of his clerks that the client had paid money for the printing charges. But in his affidavit dated 6th December 1911 he says he fully believed that the non-payment of the printing charges was due to the mistaken entry in the account. On his own statement, he was guilty of the grossest and most culpable negligence. In fact, both he and his clerks all admit that they were guilty of carelessness. Having regard to Lakshmiah's letter dated 8th January 1909, and to the appearance of entries in the account books, there are grounds for believing that he has deliberately put in a false affidavit and that he had no reason to believe that its contents were true. It is difficult to believe that the clerks, when they wrote the letters, already referred to, of July 1909 and January 1910, were making statements which they believed to be true. Their conduct towards the client must be regarded as fraudulent. The vakil told us at the hearing that Lakshmiah

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not only attended to his businesss on the Appellate Side and to the correspondence relating thereto, but was also in charge of the monies received for his cases; and he left us under the impression that the total sum of Rs 68 received from the appellant was kept by Lakshmiah. In the eye of the law at least, he is responsible for the fraud perpetrated on his client. No pleader can be permitted to completely abandon to clerks the discharge of his duties to his clients, and in any event, he must bear the full responsibility for the acts and defaults of his clerks.

We have now to decide the question whether, in these circumstances, the appeal should be restored to the file.

It is contended for the respondent that the only ground on which an appeal dismissed for default can be restored is, that the appellant was prevented by sufficient cause from appearing on the day fixed for the hearing in person or by pleader; and that the negligence of the pleader is tantamount to negligence on the part of the appellant himself and would not be a proper ground for restoration.

On the other hand, the appellant contends that the court has unfettered discretion in deciding whether an appeal should be restored or not, and that the Civil Procedure Code merely provides that, if the non-appearance of the appellant or his pleader at the hearing is explained, the court is bound to restore the appeal and that it has the power to do so for any other reason that may appear proper to it. And he further contends that negligence on the part of the pleader in consequence whereof he did not appear, is good ground for restoration, and that, in any event, where the pleader is guilty of gross negligence or fraud, as in this case, the appellant is entitled to restoration of his appeal. Order XLI, Rule 19, of the Code lays down the law on the subject. Rule 17 provides that if the appellant does not appear when the appeal is called on for hearing, the court *may* make an order that the appeal be dismissed. Rule 19 enacts when an appeal has been so dismissed, "the appellant may apply to the appellate court for the re-admission of the appeal; and where it is proved that he was prevented by any sufficient cause from appearing when the appeal was called on for hearing * * the court *shall* readmit the appeal on such terms as to costs or otherwise as it thinks fit." The decision of Sir *V. Bhashyam*

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Aiyangar J. in *Somayya* v. *Subbamma*[1] is relied on by the appellant. That judgment was passed while the repealed Code of 1882 was in force. S. 556 of the Code provided that if "the appellant does not attend in person or by his pleader, the appeal *shall* be dismissed for default" and S. 558 provided that "if it be proved that he was prevented by sufficient cause from attending when the appeal was called on for hearing * * the court *may* readmit the appeal on such terms as to costs or otherwise as the court thinks fit to impose on him." It will be observed that the present Code does not make it obligatory on the court to dismiss an appeal if the appellant makes default in appearance, while the Code of 1882 did so, and that the present Code lays down that, when the non-appearance at the hearing is explained, the court *shall* readmit the appeal, while S. 558 of the repealed Code provided that the court *may* do so.

In the case above mentioned, Sir *V. Bhashyam Aiyangar* J. held that the court had very ample powers in restoring a suit or appeal under Ss. 103, 108 and 558 of the old Code and that the power was not confined to cases where satisfactory explanation for non-appearance was given but that it might do so if any other good cause for restoration was shewn. He points out that the right of an appellant to ask for restoration is not limited by the words of the section to cases where he can explain his non-appearance, and that the Code provides generally that he may apply for the re-admission of the appeal. The learned Judge goes on to say: "There is nothing in any of the above sections of the Code to imply that the application for restoration cannot be granted, unless there was sufficient cause—though, if there was such a cause, it is made *obligatory* on the courts in the case of original suits to set aside the order of dismissal or decree passed *ex parte*, as the case may be." His view of the section was adopted by the learned *Chief Justice* of this court in *Gopala Rao* v. *Maria Susaya Pillai.*[2] In *Ismail Ibrahim* v. *Haji Jan*[3] *Russell* J. expressed dissatisfaction with this view. He says: "With regard to the case of *Somayya* v. *Subbamma*[1] it seems to me I am bound by the decision of Mr. Justice Jardine in *Manilal Dhungi* v. *Ghulam Hussain Vazeer*[4] and I confess that, if I

1. (1903) I.L.R. 26 M. 599.
2. (1906) I.L.R. 30 M. 274 at 277.
3. (1908) 10 Bom. L. R. page 904.
4. (1888) I.L.R. 13 B. 12.

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were to give effect to the judgment in *Somayya* v. *Subbamma*[1] in that way, it would be to apply the section far beyond its scope." The judgment of *Jardine* J. does really deal with the question whether any reason other than that the appellant was prevented by sufficient cause from appearing would be a good ground for restoration. According to the Code of 1882, the court was bound to dismiss an appeal when the appellant made default in appearing, without regard to any other consideration. This might naturally lead to the conclusion that, if the ground which made it obligatory on the court to dismiss was not subsequently explained, the court had no power to restore the appeal. And it would look anomalous to suppose that, if the court was bound to dismiss for non-appearance, whatever other considerations there might be for not dismissing, these considerations would be a ground for restoration. The legislature, however, has made certain changes in the provisions relating to dismissal and restoration, and these changes, in my opinion, give the court wider discretion than it possessed according to *Russell J.*

And it may be that the legislature altered the provision in the previous Act having regard to the considerations urged in the judgment of *Bhashyam Aiyangar* J. in favour of giving the court a larger measure of discretion in such cases. The court is not now bound to dismiss an appeal when the appellant does not appear at the hearing, though it is empowered to do so if it thinks fit. It is evidently intended that there may be reasons which would make it proper for the court not to pass an order of dismissal notwithstanding default. If that be so, it follows that those grounds when brought to the notice of the court after dismissal (where it passes such an order) would make restoration of the appeal proper. Consequently, either the explanation of the non-appearance, or the exhibition of circumstances apart from non-appearance, should be sufficient ground for restoration. The legislature has made it imperative on the court to grant restoration where the non-appearance is satisfactorily explained. This is evidently necessary, inasmuch as, except for non-appearance, the court has no power to pass an order for dismissal. But this does not exclude other grounds for restoration, as the court was not bound to dismiss on the simple ground of the non-appearance of the appellant.

1. (1903) I.L.R. 26 M. 599.

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It appears to me, therefore, that, under the present Code of Civil Procedure, the court has power to restore even where the appellant is not able to prove that he was prevented by sufficient cause from appearing when the appeal was called on for hearing. Whether any such ground exists in the present case, apart from the negligence or fraud of the pleader, I shall consider hereafter. Now, is the negligence or fraud of the pleader by itself a sufficient explanation for non-appearance of the appellant, where, the appellant, as in this case, was not himself present in Madras on the day of the hearing, and especially when he had no notice that the case was posted for hearing on a particular day? The respondent's contention is that the pleader's negligence must be regarded as the appellant's own negligence, as the pleader is his agent. Mr. T. R. Ramachendra Aiyar, the learned vakil for the respondent, was hardly prepared to assert that, if we found the pleader guilty of fraud or such gross negligence as would in law amount to fraud, his conduct would bind the appellant. Although, in my view, the conduct of the pleader and of his clerks, for which the pleader is responsible, does amount to fraud or such reckless negligence as must be taken to amount to fraud, it is desirable, having regard to the arguments before us, that I should express my opinion on the question whether the negligence of a pleader, which would not amount to fraud, would empower the court to restore an appeal which has been dismissed for default. Is the party responsible for the negligence of his pleader as if it were his own negligence, and should he be always restricted to an action for damages against his pleader without any remedy against the opponent in the litigation? I have not got to deal with a case where a pleader enters, on behalf of his client, into a contract or bargain or other transaction with a third party under which the latter acquires a complete legal right. But the respondent contends that when judgment is passed by a court dismissing an appeal, the respondent acquires a right under that judgment which he cannot be deprived of in the absence of some ground entitling the appellant to relief against him on well understood legal principles similar to those empowering a party to set aside a contract, and that the conduct of the appellant's pleader cannot be regarded as such a ground. This argument appears to me to be fallacious. The respondent in such a case does not

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acquire a right under any declaration made by an adjudication of court settling the rights of the parties to the litigation. The law which empowers a court to pass judgment dismissing the appeal without adjudicating on the rights of the parties also gives it power to annul the order of dismissal. The respondent has no reason to complain if such power is capable of being exercised in cases where the appellant is not himself personally guilty of negligence. Nothing more is done than to restore the parties to the *status quo ante* and to proceed with the adjudication of disputes on the merits. There is no reason for assuming that the legislature intended to give the respondent an absolute right to the judgment passed for default without any judicial adjudication of the merits. If the respondent has been so affected that he cannot be restored to his former position, that may be a ground for refusing restoration. The discretion vested in the court would enable it to deal with any proper objections that the respondent may urge against restoration. The principle regulating dealings between parties, where one of them acts through an agent, is not necessarily applicable to proceedings in court conducted through a pleader. The court has the control over such proceedings, and it is a question for the legislature in what manner that control should be exercised. Besides, it must be remembered that a pleader is not altogether in the position of a private agent engaged by a party. As pointed out by *Sir Bhashyam Iyengar* J. in *Somayya* v. *Subbamma* [1] a party can engage as his pleader "only a person who has been enrolled as a pleader by the court." I may add that a litigant engaging a pleader is not in a position to control his pleader's actions in the manner that a principal can control the conduct of a private agent. The rights of the pleader, as one belonging to a learned profession and having a considerable measure of liberty as a member of that profession, might prevent such control. A person is not absolutely bound by the conduct of those who, by powers vested in them under the law or by statute, have a right to act on his behalf and to affect his interests by their action. I may mention a guardian, whether natural or statutory, the manager of a Hindu family, a trustee, the Court of Wards which assumes the superintendence of the estates of

1. (1903) I. L. R. 26 M. 599.

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persons under disability—as illustrations of this principle. A pleader, no doubt, unlike the classes of persons just mentioned, is chosen by the litigant, and he has considerable powers of binding the pleader by specific instructions. Still, such powers are limited and his choice itself of the person to act for him is also limited by its being confined to a class enrolled by the court as officers to help it in the administration of justice. The pleader engaged in a case may be a barrister against whom it may be difficult for the client to obtain any redress. How can it be held in such a case that no relief can be granted against the opponent who has obtained judgment owing to the pleader's negligence? It must also be remembered that in this country there are pleaders of various grades possessing different qualifications and possibly inspired by different standards of professional conduct and rectitude. In *Neale* v. *Gordon Lennox* [1] the House of Lords held that an agreement to a reference to arbitration, made by counsel against the instruction of his client, was not binding on the latter. It was contended there that the counsel had absolute authority to bind the client by such a consent, unless the restriction on his authority was known to the opponent. An application was made in that case by the client to set aside the reference to arbitrators. The Court of Appeal held that the consent of the counsel was binding on the client. But the House of Lords reversed that opinion. Lord *Halsbury* observed: "I will not go through the cases, because to my mind there is a higher and much more important principle involved. The court is asked for its assistance—and I entirely repudiate the technical distinction between what is called an application for specific performance and an order to be made that such and such things should be done—the court is asked for its assistance, when this order is asked to be made and enforced, that the trial of the case should not go on; and to suggest to me that a court of justice is so far bound by the unauthorised act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extraordinary proposition that I ever heard. That condition of things seems not to have been in the contemplation of the Court of Appeal. I will only say for myself that I should absolutely repudiate any such principle. When the contract is

1. (1902) L. R. Ap. Cas. 465.

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something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents that contract being undone. The contract is by law final and conclusive. But when two parties seek, as part of their arrangement, the intervention of a court of justice to say that something shall or shall not be done although one of the parties to it is clearly not consenting to it, but has in the most distinct form said that the consent to refer—to take it from the jurisdiction of the ordinary tribunal—shall only be on certain terms, to say that any learned counsel can so far contradict what his client has said and act without the authority of his client as to bind the court itself, is a proposition which I certainly will never assent to." Later on his Lordship says: "But when I come to this case and consider the question of what should be the position of the other party who has acted upon the apparent authority of counsel, there are cases in which the court undoubtedly in the exercise of its discretion might well say: 'if it is only a question of money, if it is only a question which costs will rectify, this matter can be put right by the payment of costs.' That is one example. Or the position of the other party might have been totally altered by what has taken place, and therefore we cannot interfere. That would be because upon its general jurisdiction of doing justice between the parties the court would think that it was not a case in which it ought to interfere. These were the words which were uttered by Lord *Lyndhurst* in one of the cases which have been quoted." Lord *Lindley* observes: "The judgment of the Court of Appeal proceeds upon the ordinary doctrines of agency; but the ordinary doctrines of agency are only half of what is to be considered in a matter of this kind." That case, no doubt, is not, in its facts, quite analogous to the present one, but it shows that the doctrines of agency should not be applied without reservation to a pleader. When the court has any control over the proceedings and when the act of a pleader is not one done entirely out of court, it is not proper, by applying purely the doctrine of agency, to bind the client absolutely by the pleader's act. In *Furnivel* v. *Bogle*[1] it was held that a client is not bound by a compromise made by counsel, if the counsel was under a

1. (1827) 4 Russ. 142., S. C. 38 E. R. 758.

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mistake of fact when he agreed to it. Besides, when a pleader by negligence does not put in an appearance at the hearing, in what sense can it be said that he represents his client in not doing so, when he has been retained to appear and conduct the case? It may be that a client would not be entitled to relief against his opponent merely because his pleader in the actual conduct of the case was guilty of negligence in adducing evidence or in arguing the case or otherwise, in consequence of which the judgment went against the client. Whether this principle is subject to any limitations it is unnecessary to consider in this case. It is enough to say that the failure of the pleader to appear at all for his client is distinguishable from negligent performance of his duties. It must be conceded that the respondent's argument that he acquired some sort of right by the dismissal of the appeal for default, is not unsupported by authority. In *In Re. Coles and Ravenshear*[1], by a mistake of counsel the time for an appeal was allowed to elapse and special leave of the court of appeal was asked under the rules to extend the time for appealing. The court held that it had no power to do so. But the judgment was based by two of the learned Judges at least—*Collins*, M. R. and *Cozens-Hardy*, L. J.—on precedents which, in their opinion, compelled them not to allow extension. Both the learned judges declared that they would come to an opposite conclusion, if they were free to do so. *Cozens-Hardy* L.J. pointed out that the high authority of *Bowen* L. J., *Cotton* L. J. and *Brett* M. R. was in favor of holding that the court's discretion to grant extension was unfettered—*In Re. Manchester Economic Building Society*[2]; *Collins* v. *Vestry of Paddington*.[3] On the other hand, *James*, L. J., in *International Financial Society* v. *City of Moscow Gas Co.*, [4] observed: "The limitation of the time to appeal is a right given to the person in whose favor a judge has decided. I think we ought not to enlarge that time unless under some very special circumstances indeed, that is to say, if there has been any misleading through any conduct of the other side, as was mentioned in the analogous case of vacating enrolment which came before Lord *Cottenham*, and afterwards before Lord *Chelmsford*, in which it was laid down that the right of the suitor was *ex*

1. (1907) L. R. 1 K. B. p. 1.
2. (1883) R. L. 24 Ch. D. 488.
3. (1879) L. R. 5 Q. B. D. 368.
4. (1877) L. R. 7 Ch. D. 241.

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debito justitiæ to keep his enrolment of the decree if it was made in due time, unless in very special cases. For instance where there was anything like a misleading on the part of the other side, or where some mistake had been made in the office itself and a party was misled by an officer of the court, or again where there was some sudden accident which could not have been foreseen—some sudden death or something of that kind—which accounted for the delay; in such cases leave might be given." *Farwell* L. J. (in *In Re. Coles and Ravenshear*[1]) while agreeing that it is, generally speaking, undesirable to fetter a discretion given under the rules by hard and fast lines, was influenced by the consideration, which I may express in his own words: "The litigant in such a case has not been deprived of a hearing. His case has been heard in the court below." With the utmost deference, it may not be improper to ask, is it not of equal importance to the litigant that he should be heard by the Court of Appeal when he feels aggrieved by the decision of the court of first instance, provided there are reasonable grounds for the court exercising in his favor its discretion to extend the time for appeal? It is unnecessary, however, to refer further to the conflicting English decisions, as they proceed upon the language of the rule applicable to each particular case in the Judicature Act. But I may observe that the English courts do not feel fettered in the exercise of their discretion, where the rule applicable is expressed in terms sufficiently wide and where the court does not feel pressed by precedents applicable to the particular rule. Thus in *Baker* v. *Faber* [2] the Court of Appeal extended the time for appeal under Order LXIV, rule 7, and distinguished the previous case *In Re. Coles and Ravenshear* [1] on the ground that that case had reference to another rule. The language of *James* L. J. in *International Financial Society* v. *Moscow Gas Co.*[3] was adopted by the Bombay High Court in *Bhimrao* v. *Ayyappa*[4] where the court was asked to excuse the delay in the presentation of an appeal. But with all deference I am unable to accept the position that the theory of the acquisition of a right by the respondent could be put forward where such acquisition is made subject by the legislature to a discretion in the court to affect such supposed right by its

1. (1907) L. R. 1 K. B., p. 1.
2. (1908) E. W. N., p. 9.
3. (1877) L. R. 7 Ch. D. 241.
4. (1906) I.L.R. 31 B. 33.

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order in the interests of the appellant. Possibly, the fact that limitation, which is itself a well recognised source of right, was what was sought to be relieved against, might have influenced the view expressed in *International Financial Society* v. *Moscow Gas Co.* [1] and *Bhima Rao* v. *Ayyappa*[2]. But the present case is not one in which any right is set up on the ground of limitation. There are several cases in England in which the mistake or negligence of the solicitor has been recognised as giving a right to relief to the client. See SEATON on *Judgments*, Vol. I, p. 139, in which cases of restoration of an action dismissed for default of plaintiff's appearance are referred to, and the rule is stated to be that the action will be restored on payment of the costs of the opposite side. See also *Burgoine* v. *Taylor*[3]; *Southampton, etc., Steam Boat Co., Ltd.* v. *Rawlins*[4] and *Michell* v. *Wilson*[5]. *In De Ronfiguy* v. *Peale*, [6] in restoring an action, the court held that "it would only be encouraging negligence of attorneys to grant such indulgence in the ordinary way at the client's expense. Attorneys ought to know that they are amenable to their clients for the consequence of such neglect."

Neither would it be putting the plaintiff in the same situation if they were to grant the rule on the payment of costs between party and party. They therefore granted a *rule nisi*, which, on a subsequent day, was made absolute, for a new trial upon payment by the defendant's attorney, out of his own pocket, of all costs as between attorney and client. (The defendant was the party who failed to appear in that case owing to the solicitor's negligence). In India also, suits have been restored where the failure to appear was due to the pleader's mistake or negligence—see *Oriental Finance Corporation* v. *Mercantile Credit & etc. Corporation* [7], where *Couch* C.J. states the English rule to be in support of his judgment; *Narain Singh* v. *Bheurab Churu Panda Ghose*[8], where the appellant was misled by the failure of the pleader to intimate the transfer of the appeal from the file of the Judicial Commissioner, Chota Nagpur, to that of the Deputy Commissioner of Manbhoom; *Kailash Chunder Das*

1. (1877) L. R. 7 Ch. D. 241.
2. (1896) I. L. R. 21 B. 33.
3. (1878) L.R. 9 Ch. D. 5.
4. (1865) 34 L.J. Ch. 287.
5. 25 W.R. 380.
6. 12 R. R. 687.
4. (1866) 2 Bom. H.C.R., App. C. p. 267.
5. (1881) 8 C. L. R. 350.

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v. *Ramanadha Chauduri*[1], where the pleader's clerk left the place on account of illness, taking away the papers with him and no intimation was given to the client of the hearing. Another case relied on by the appellant—*Anandamoyee Dossee & others* v. *Poornachunder Roy*[2]—has really no bearing on the point. In America the negligence or fraud of the attorney has been held to be a ground for restoring an action dismissed for default, though the practice is not uniform in all the States. In BLACK on *Judgments*, S. 340 (*a*) refers to cases of negligent performance of duties, where much stronger grounds would be necessary to entitle the client to relief. At page 256 the learned author observes : "On the other hand, it is held in a few States, and notably in New York, that the negligence of the attorney is a sufficient ground for setting aside the judgment, provided that the client himself was not directly in fault. A party may be relieved from a judgment obtained against him by reason of the negligence, ignorance or fraud of his attorney, without compelling him to resort to an action against the attorney, or showing the latter to be insolvent. And even in the States which generally adhere to the stricter rule, there is a disposition to relax it somewhat under exceptional circumstances." The proper conclusion to come to is, in my opinion, that the court is not bound to restore an appeal in every case where the non-appearance is imputable to the pleader's negligence, but may, in its direction, leave him to his remedy against the pleader by an action for damages. But it would often work grave injustice to confine him to such remedy. As observed by *Bhashyam Iyengar* J. in *Somayya* v. *Subbamma* [3] : "It may be that the party who has thus suffered is only able to obtain a decree for nominal damages or a fruitless decree for substantial and adequate damages against such pleader, next friend or guardian, and in the majority of cases it will be impracticable to establish before the court in which he sues for damages, which may happen to be a Court of Small Causes, that he could ultimately have succeeded in the suit or appeal which was pending in the High Court or some other tribunal and which has been dismissed for default. And in a large class of suits in which the claim is not a mere pecuniary one compensation by way of damages would be no remedy at all."

1. (1897) 2 C. W.N. 414. 2. (1861) 9 M.I.A. 26.
3. (1903) I. L. R. 26 M. 599.

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The courts have sufficient disciplinary jurisdiction over pleaders as such, as well as over next friends and guardians *ad litem* of infa..'s, and ample power to subject parties to terms as to costs when relieving them on reasonable and proper grounds from the serious and, in some cases, irreparable consequences of refusing to restore to file cases which have been dismissed for default or in which decrees were passed *ex parte*. In *Guilt* v. *Crawley*[1] relief was refused on the ground that the defendant would be prejudiced by doing so. *Tyndall* C. J. observed: "It would be a gross injustice to plaintiff if we were to listen to the application, as it would enable the defendant to lie by, and, after hearing the particulars of the plaintiffs' case, to harass him with a new trial and evidence got up in answer." In *Flower* v. *Gedyl*,[2] relied on for the respondent, the court, no doubt, refused to restore the case. But no rule was laid down that it had no power to do so.

I have already observed that the negligence in the present case is so gross as to amount to fraud, the evidence showing a design on the part of either the vakil or his clerks to do nothing for the client and to appropriate his money. Even in the case of a mere agent conduct of this kind might entitle the principal to disaffirm the act of the agent. In KERR on *Fraud*, 4th edition, page 280, in dealing with the question whether notice to the solicitor can be treated as notice to the client, it is observed: "The tendency of the later decisions and of the Conveyancing Act, however, has been in favour of the doctrine that when a man employs a solicitor, whose own purpose and meaning in the transaction is to cheat and defraud his client, and who in furtherance of this intention keeps back purposely from his knowledge the true state of the case, the presumption is conclusively repelled that the client has imputed or constructive notice through the solicitor of the fact which has been concealed from him." "This exception" said *Fry* J. in *Cave* v. *Cave*,[3] "has been put in two ways * * In the one view, notice is not imputed,

1. (1831) 8 Bingham 144.
2. (1857) 23 Beav., p. 449; 53 E. R. p. 177.
3. (1880) L. R. 15 Ch. D. 639 at p. 644.

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because the circumstances are such as not to raise the conclusion of law, which does ordinarily arise from the mere existence of the notice to the agent. In the other view, the act done by him in his character of agent is such as cannot be said to be done by him in his character of agent, but is done by him in the character of a party to an independent fraud on his principal and that is not to be imputed to the principal as an act done by his agent."

For these reasons, I am of opinion that we have power to restore the appeal to the file and that we should do so in this case. Apart from the conduct of the pleader and his clerks, there are other reasons why we should do so. The suit is one relating to immovable property, and it is impossible to say whether any decree that the appellant might obtain for damages against the pleader would be adequate compensation for the injury sustained by him by the loss of his suit. Moreover, the suit was instituted by the appellant and under leave of court on behalf of himself and other persons belonging to a community of individuals whose rights might also be affected by the dismissal of the appeal.

We therefore set aside the order of dismissal for default passed by this court on the 26th Junuary 1910 and direct that the second appeal be restored to the file subject to the conditions mentioned below. And we further direct that the pleader G. Krishnaswami Aiyar do pay all costs of this petition, as well as the 3rd respondent's costs of the day for the former hearing of the 26th January 1910. He will also pay into court within 3 days the amount due for printing charges in the case. If he fails to do so, the appellant will have 5 days from that date to pay the amount. In default of payment by either the pleader or the appellant, this petition will stand dismissed without further orders.

Spencer J.:—As regards the power of courts to restore appeals dismissed for the appellant's default, in *Somayya* v. *Subbamma* [1] *Bhashyam Aiyangar* J. cited the instance of suits being dismissed for other causes than non-attendance, *e. g.*, the vakil's

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1. (1903) I. L. R. 26 M. 599.

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vakalat being in the opinion of the judge invalid or exhausted or the vakil being not entitled to practise in the particular court, or the plaintiff or defendant being personated by another. The learned Judge proceeded to observe that in such cases, if restoration can only be granted where there is sufficient cause which prevented the party's appearance, the applicant for restoration can have no remedy, for "he does not profess to establish that there was a sufficient cause which prevented him or his vakil from appearing."

Now the words used in S. 558 of the Code of Civil Procedure of 1882 are: "If it be proved that he was prevented by any sufficient cause from attending when the appeal was called on for hearing or from depositing the sum so required, the court may re-admit the appeal on such terms as to costs or otherwise as the court may think fit to impose upon him." Section 551 (2) also uses the word 'attend' not 'appear.' It says: "If on the day fixed under sub-section (1) or any other day to which the hearing may be adjourned, the appellant does not attend in person or by his pleader, the appeal shall be dismissed for default." But sub-section (1) refers to the *appearance* of the appellant or his pleader, and appearance, to my mind, means effective appearance. Cf. *Esmail Ebrahim* v. *Haji Jan* [1] where a plaintiff was present in court without his vakil but was not ready to go on with his case in his vakil's absence. For instance, a pleader who informs the court that he has no instructions from his client may be regarded as not putting in an appearance for him. Failure to appear would thus include disability of the pleader from want of a proper vakalat or other cause of a similar nature. Appearance is defined in WOODROFFE and AMIR ALI'S Commentary under Order IX, Rule 1, as the actual attendance in the court-house of the party in person or by pleader or recognised agent, who must be duly appointed to act on his behalf. If appearance is made by pleader, the pleader must be duly authorised and able to answer all material questions. (See also the Commentary under Order III, Rule 1.) In

1. (1908) 10 Bom L. R., p. 904.

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the Code of 1908 the word used in Order XLI, Rules 17 & 19, corresponding to the old sections 556 and 558, is 'appear', not 'attend.' In my opinion, if an appellant fails to deposit the costs of printing material documents, he fails to perform one of the acts which the law declares to be necessary to complete his appearance at the hearing, as the court will not hear him, though he be present, if the papers are not printed. In this view, the language of the present Code seems to be wider and to embrace all kinds of default in appearance. Rule 19 of Order XLI appears to invest courts with ample power to re-admit for sufficient cause an appeal dismissed for failure to pay printing charges, irrespective of the fact whether the appellant and his vakil were or were not present in court on the date when the case was posted for orders under Rule 100 (*a*) of the Appellate Side Rules of Practice. I do not find any other express provision in the Code of Civil Procedure for re-admitting appeals in cases where the appellant is not able to prove that he was prevented by sufficient cause from being present when the appeal was called on for hearing. The only other remedy, as pointed out by *Bhashyam Iyengar* J., is not always satisfactory.

I feel no doubt as to the discretionary power of courts to restore appeals dismissed owing to negligence of an appellant's pleader, where the appellant himself has shown all possible diligence towards causing appearance to be made, and I agree with my learned brother in the order proposed to be passed in the particular case and also as to the opinion which he has formed of the pleader's conduct in the matter.

IN THE HIGH COURT OF JUDICATURE AT MADRAS. Maravadi v. Pamakkar.

Present :—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Maravadi and others .. Appellants*
v. (*Plaintiffs*)
Pamakkar .. Respondent
(*Defendant*).

Malabar Law—Marukmakkathayam and Aliyasantana family—Maintenance—Separate maintenance—Living away from family house—Good grounds—Waiver—Past maintenance.

In order that a member of a Marumakkathayam or Aliyasanthana Tarwad may be entitled to separate maintenance, he or she should be abe to allege some good ground for doing so. To go out of the Tarwad house for living with the husband is a good ground for claiming separate maintenance. If a member lives away from the Tarwad house for an improper purpose that would be a good ground for refusing separate maintenance. What purposes are proper and what improper should be left for the decision of courts. Where there is substantial inconvenience in living in the family house either on account of want of room there or because there are quarrels which make it uncomfortable to a member to live there or where there are several houses belonging to the Tarwad and a member lives in one of them and where the Karnavan's onduct has afforded a valid excuse for a member living away from the Tarwad house, separate maintenance may be awarded. In determining the rate of maintenance more should not be allowed than would be received by the claimant if he resided in the family house along with its other members and the grant of a share of the income proportionate to the number of members is unsustainable.

In a suit for past maintenance waiver during any portion of the period for which maintenance is claimed may no doubt be inferred. It may be sufficient to show that the conduct of the party was such as to lead to a reasonable inference of waiver.

Second appeal from the decree of the District Court of South Canara in A. S. No. 82 of 1909 presented against the decree of the Court of the District Munsif in O. S. No. 387 of 1908.

The facts are sufficiently set forth in the judgment.

B. Sitarama Rao for appellant :—No Yejman has got the right to say that he would not maintain a junior member unless he works. A junior member does not forfeit his right by misbehaviour—*P. Teyan Nair* v. *Ragavan Nair*[1]. His self acquisitions are not to be taken account of in giving maintenance.

* S. A. No. 1159 of 1910. 14th December, 1911.

1. (1881) I.L.R. 4 M. 171.

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Their rights of maintenance are by virtue of their ownership of the property. Marriage is recognised among the Aliyasantana people and the wives customarily reside with their husbands-*Devu* v. *Deyi*[1]; *Subbu Heggade* v. *Tongu*[2]; *Koraga* v. *Queen*[3]. They are given away in marriage by their Yejamans. Is it not a fair inference to make that their living away is with the assent of their Yejmans and therefore the Yejamans are liable for their maintenance? Any how they are living away for a proper purpose. The perpetuation of the Tarwad is as much a matter for anxious consideration among the Aliyasantana people as among other Hindus and their maintenance ought to be paid if demanded. There might be waiver; non-demand under those circumstances might amount to waiver. *Subbu Heggade* v. *Tongu*[2] has been departed from in principle—*C. K. Nallakandiyil Parvadi* v. *C. K. Chathu Nambiar*[4]; *Peru Nayar* v. *Aiyappan Nair*[5]; *Chekhuti* v. *Pakki*[6]; *Raman Menon* v. *Ittimayamma*[7]. Any-how, it is open to any Aliyasantana spouse to discontinue her residence with her husband, and if, with that intention, she makes a demand and there is a non-compliance, thereafter her being maintained by her husband is no ground for refusing her maintenance. At any rate she is entitled to maintenance as and when she comes to the family house. If she is not maintained then, why can she not claim maintenance thereafter? The law of maintenance is growing—see *Parvathi* v. *Kanaran Nair*[8]. An occasional visit to the husband's house does not make residence at the family house any the less permanent—*Raman Menon* v. *Ittimayamma*[7].

K. Narayana Rao for respondent:—That the junior member should live and work does not seem to be wholly unsupported—*vide* Gangolly Krishna Rao's Aliyasantana Law. Allowing maintenance to ladies with their husbands might lead to litigation and frittering away of estates.

B. Sitarama Rao replied.

The Court delivered the following

JUDGMENT:—The suit in this case is one for arrears of maintenance instituted by 15 members of a family in South

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1. (1885) I.L.R. 8 M. 353.
2. (1869) 4 M.H.C. R. 196.
3. (1883) I.L.R. 6 M. 374.
4. (1881) I.L.R. 4 Mad. 169.
5. (1880) I.L.R. 2 M. 282.
6. (1888) I.L.R. 12 M. 305.
7. (1899) 9 M.L.J. 153.
8. (1882) I.L.R. 6 M. 341.

Canara governed by the Aliyasantana system of law, against its manager or Yejamanathi the defendant. The plaint alleges that the defendant left the family house of the parties and went away to reside elsewhere about five years before the date of the suit, and that she neglected to look after the maintenance of the plaintiffs, junior members of the family. The defendant denied that she quitted the family house and contended that several of the plaintiffs were living away from the house. She alleges she has no objection whatever to maintain the plaintiffs if they all come and live in the family house. She denies the plaintiffs' right to separate maintenance when not living in the house. Her case is that the 4th plaintiff and her minor children, plaintiffs Nos. 10 to 12, were living in the house of 4th plaintiff's husband, that the 5th plaintiff and her minor children, plaintiffs 13 to 15, were residing at the 5th plaintiff's husband's house, and that 8th and 9th plaintiffs were living in the house of their father. It is not stated that the plaintiffs Nos. 1 to 3, 6 and 7 were living elsewhere.

The District Munsif found that the defendant was not living in the family house but in another house of her own about 3 miles away from the former and he held that the defendant had failed to maintain any of the plaintiffs during the period for which maintenance is claimed. He also found that the plaintiffs 4, 5 and 8 to 15 had not been proved to have been living away from the family house though some of them might be visiting at the houses of their husbands or fathers. He awarded plaintiffs a $\frac{15}{40}$th share of the income the plaintiffs being 15 out of a total of 40 members in the family. On appeal the District Judge dismissed the suit by a judgment which we cannot but regard as unsatisfactory. He had not found whether the defendant went away from the family house to reside elsewhere or not. He objects to the Munsif's decree awarding to the plaintiffs a numerically proportionate share of the family income. He is no doubt right in doing so. He says that the District Munsif's decree further takes no account of the considerable time spent by the various palintiffs in their fathers' or husbands' houses during which they were entitled to no maintenance at all in their family house. We cannot ascertain from this record how much, if any, maintenance is really due to them. But he does not find what time,

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if any, each of the plaintiffs was away from the family house. He has assumed that a member going on visit to the house of a relation such as husband or father, would be 'disentitled' to maintenance or that the Yejaman would be entitled to make proportionate reduction from the maintenance due to that member. He then says: "It appears clearly, however, that the Yejamanathi has always been willing to maintain all those who lived and worked at home, and it is clear from the evidence of P. W. 4 who tried to hold a panchayat about the matter that plaintiffs' real purpose is to live away from home in their husbands' and fathers' and wives' houses and do no work at home and yet draw their full share of maintenance from there. This they cannot do." Here again he has assumed without discussing the question that a person not doing work in the family house is not entitled to maintenance even when he is willing to live there, for he has not decreed any maintenance to the plaintiffs Nos. 1 to 3 and 6 and 7 who, the 1st defendant does not allege were living away from the family house. It is clear that we must set aside this judgment and remand the appeal for rehearing and fresh disposal. But as the Judge has enunciated several questionable propositions of Aliyasantana law, we consider it our duty, in order to avoid a further remand, to express our view of the law which should govern and dispose of the suit.

According to the Aliyasantana system which is very similar in its incidents to the Marumakkathayam Law (see *Subbu Heggade* v. *Tongu*[1]) as no member of the family is entitled to enforce partition of the family property which belongs to all the members, every junior member is entitled to be maintained by the Karnavan and has the right to object to any improper administration of the property of the Tarwad and to see that it is duly conserved for the use of the Tarwad. The income belongs to all and all are entitled to participate in the benefit of it but the manager is entitled to administer the property and to use the income for the common benefit of all the members. As observed in *Narayani* v. *Govinda*[2] the Tarwad is a family of which the Karnavan is the manager, and, although as a senior member he enjoys special consideration, he has no higher claim in the enjoyment of the income than any other member of the family. He has a right to expend as

1. (1869) 4 M. H. C. R. 196. 2. (1884) I.L.R. 7 M. 352.

he pleases for the common benefit of all. The right to maintenance is an individual right. In *Kunhamatha* v. *Kunhi Kutti Ali*[1] *Turner* C. J. says :" Each member of a Tarwad has a right to be maintained and suffers a personal wrong if that right is not accorded to him." The right is not confined to cases where a member has no means of his own because by virtue of his ownership in the Tarwad property he is entitled to participate in its income. See *Thayu* v. *Shungunni*[2]. It has been held that a suit for maintenance by a junior member of a Marumakathayam or Aliyasantanam family is one that falls under Article 127 of the Limitation Act, as a suit to enforce the right to share in joint family property—*Atchutan Nair* v. *Kunjunni Nair*[3]—and not one under Article 129, which applies to suits which are strictly for a right to maintenance where a person has owned property belonging to another. The Tarwad property cannot be sold except in cases of necessity without the consent of the junior members. See *Kalliyani* v. *Narayana*[4] and *Raman Menon* v. *Raman Menon*[5]. Junior members are entitled to recover on behalf of the family property improperly alienated by the manager —*Anantan* v. *Sankaran*[6]. In other words the right to maintenance in a Malabar Tarwad is the mode in which the right of ownership is enforced.

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As no one can enforce partition between the members and as it is the practice for all the members to live together in the same honse, all are generally maintained in the Tarwad house by the Karnavan in whom the right of management is vested and one of whose primary duties is to maintain all the junior members according to the means of the family. The manager who is also the protector of the other members and the guardian in law of those who are minors has not only considerable discretion in his management of the property and the use of it for the benefit of the members but also considerable disciplinary power in the government of the household. To him must fall the allotment of the quarters of each of the members and if the family house is insufficient for the residence of all, the allotment of a separate house to some of them. As the governor of a family sometimes consisting of numerous members he would

1 (1883) I.L.R. 7 M. 233.
2. (1881) I.L.R. 5 M. 71.
3. (1903) 13 M.L.J. 499.
4. (1885) I.L.R. 9 M. 266.
5. (1900) I.L.R. 24 M. 73 (P.C.)
6. (1890) I.L.R. 14 M. 101.

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naturally distribute also the work of the family and would have the powers of correction over the members. But this right of his as the head of the family co-exists with the rights of all the members as legal owners of the family property and the latter cannot be allowed to be seriously prejudiced by the former,—see *Teyyan Nair* v. *Raghavan Nair*.[1] The law regulating the right of junior members to maintenance has been gradually developed in the decisions of the court and it is necessary to state the position in which it now stands. In the earlier cases it was sometimes stated that the right of a member is only to be maintained in the family house and that he has no right to maintenance if he resided elsewhere. But it will be observed that in some of the cases at least this statement was made in denial of the right of any member to enforce the payment to him separately of a proportinate share of the income. Such a claim was regarded as an indirect attempt to enforce a right to partition which no member of a Marumakatayam Tarwad possesses.

In A. S. No. 275 of 1858 (Tellicherry) and in A. S. Nos. 238 and 278 of 1860 (Tellicherry) such a claim to an aliquot part of the family income was negatived by Mr. *Holloway*. See MOORE'S *Malabar Law and Custom*, pages 124 and 125. The statement that a definite share of the income cannot be claimed by a junior member is no doubt coupled in one of these cases, A. S. N.o 275 of 1858, with the statement that 'the junior members are not entitled to be supported out of the family house from the family property.' But it is doubtful whether the learned Judge intended to lay down any such rigorous rule, for, in another case where also a proportionate share of the income was claimed by some junior members of the family, after negativing such a right, he abstained from decisively laying down that no member had a right to be maintained out of the family house,—see MOORE, p. 125. The last case came up to the High Court in appeal and in dismissing the appeal *Frere* J. gave expression to the dictum that the members individually are only entitled to maintenance in the family house and the doctrine of the English equity as to the right of *cestui que trust* to call for an account has no application to a case like the present—*Kunnigaratu* v. *Arrangaden*[2]. It will be observed that the

1. (1881) I.L.R. 4 M. 171.

2. (1864) 2 M. H. C. R. 12.

denial of the right to an account does not necessarily lead to a denial of the right to some portion of the income for maintenance outside the family house. *Frere* J. proceeded to explain his concurrence in the judgment of Mr. *Holloway* who, as already pointed out, did not decide that there would be no right to separate maintenence. The next reported case—*Subbu Heggade* v. *Tongu*[1] —was one from the South Canara District and the parties were governed by the Aliyasantana Law. There the plaintiff, a female member of the family, sued on behalf of herself and her children and grandchildren for maintenance both past and future. She was living with her husband in her house; her claim was resisted on the ground that she was entitled to no maintenance during the lifetime of her husband who was bound to provide for her according to the usage obtaining in South Canara. The Subordinate Judge negatived this contention and gave the plaintiff a decree. The Civil Judge on appeal held that an Aliyasantana husband was bound to support his wife and children, but confirmed the decree awarding the plaintiff's maintenance from the family property. The special appeal was heard by *Scotland*, C.J. and *Ellis* J. They dismissed the plaintiff's suit. They held that "the suit was obviously not brought to recover the necessary means of support but to obtain under the name of maintenance the separate enjoyment of a portion of the income of the property equivalent to the share of it which the plaintiff had failed to recover by her suit for a division. The claim in the plaint is very similar to that in the case of *Kunnigaratu* v. *Arrangaden*[2], in which the suit was held not to be maintainable on the ground that it was an attempt to obtain indirectly relief which the plaintiff could not obtain directly." They then proceeded to consider whether the plaintiff could claim maintenance. They observe that "no decision could be based on any custom applicable to the parties" and that the case should be decided "on the reasonable effect to be given to the Aliyasantana Law in regard to the rights of the family collectively and individually in the family property and to the nature of the marriage relation." Reference is made to Bhutala Pandia's work according to which no member has a right to partition and the possession and control of the property belongs exclusively to the manager.

1. (1869) 4 M. H. C. R. 196. 2. (1864) 2 M.H.C.R. 12.

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They then observe : "So far the law appears to be settled and imports clearly, we think, the presentation of the unity of the family as the only effectual mode of securing to the members severally a full share of the beneficial enjoyment to the joint estate. The obvious effect of allowing one or more members to quit the family and live apart on a portion of the income of the estate sufficient to support a position and enjoyment by the other members would be to reduce the benefit of the family in a greater or less degree according to the number of members who might choose to live separately on such allowances and nearly as much so as by appropriating the shares in the *corpus* of the property on a division. It seems to us, therefore, that the pecuniary beneficial interest of the members individually in the family property is in its nature incompatible with the separation from the family." No objection can be taken to the statement that no member can claim either a proportionate share of the income or a sufficient portion to enable him to maintain the same position outside the family as those who live in the family house do, for obviously it would cost more to support a person singly on the same scale or comfort than it would do if he lived in the family residence. But this does not logically lead to the conclusion that a member living away from the family is not entitled to any thing out of the property for his maintenance. The judgment then refers to a passage relied on by the plaintiff in the suit from Bhutala Pandya's work which provides that " if misunderstandings arise between the elder and younger sisters, the elder shall provide the younger with a house and household articles." *Ahbaku* v. *Ammu Chetti*[1] is also referred to as well as a statement by Mr Strange in his " Manual of Malabar Law " where the author says " Females, whether in alliance with males or not, reside in their own families." It need hardly be observed that Mr. Strange's statement does no more than state the social practice of females residing in the Tarwad house and in no way supports the inference that if they live with their husbands they are not entitled to maintenance. The learned Judges finally say that a wife's residence with her husband must be treated as a separation from the family, as the union between the sexes according to the Aliyasantana Law is not a marriage but concubinage

1. (1880) I.L.R. 2 M. 282.

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and refer to the practice in Malabar of women continuing to live in their Tarwads without residing with their husbands. They state that it will probably be found that the general law would impose an obligation on an Aliyasantana husband to support his wife and children but do not rest their judgment on that ground. As the learned Judges expressly base their judgment on inference to be drawn from the principles of Aliyasantana Law it may be permissible to point out with all respect that neither the social custom of married women living in their family house nor the absence of a right to an action for a definite share of the family income would seem to support the conclusion that a woman has no right to maintenance at all when she lives with her husband in his own house. The decision does not expressly deal with the right of male members to live outside of the family house for purposes of work, education or other good causes. In *Peru Nayar* v. *Ayyappen Nair* [1] *Kernan* and *Muthusawmi Iyer* JJ. held that where a Karnavan has been the cause of quarrels which necessitates a member leaving the family house he would be entitled to separate maintenance. The same rule would apparently apply even though the quarrel may not be due to the Karnavan, but a member is obliged to leave the house in consequence of quarrels which the Karnavan is not able to put an end to. If the Karnavan does not allow a member to live in the family house or in consequence of ill-treatment makes it impossible or difficult for him to live there, there can hardly be any doubt that separate maintenance will be awarded. A decree for maintenance was also given where there were several houses belonging to the Tarwad and the claimant lived in one of those houses—*C. K. Nalla Kandyil Parvadi* v. *C.K Chathu Nambiar.*[2] It was apparently not thought that the Karnavan had the power in such a case to require any particular member to live in the Tarwad house and it was considered that it was not wrong on the part of a member in such a case to live away from the Tarwad house. A further step was taken in *Chekkutti* v. *Pakki* [3] where separate maintenance was allowed to a junior member not living in the family house but in another house belonging to the Tarwad. The court observed that the Karnavan did not contend that the plaintiff lived apart from him without his permission

1. (1880) I.L.R. 2 M. 282. 2. (1881) I.L.R. 4 M. 169.
3. (1889) I.L.R. 12 M. 305.

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and contrary to his wish. But *C. K. Nakakandiyil Parvadi* v. *C. K. Chathu Nambiar*[1] does not recognise any right on the part of the Karnavan to compel the residence of a member in a particular house, where there are more houses than one belonging to the Tarwad. S. A. 23 of 1882 also recognises a right to separate maintenance where there is no room in the family house, a question on which apparently the court is at liberty to arrive at its own finding. In *Raman* v. *Ittiyamma*[2] *Subrahmanya Aiyar* and *Moore* JJ. held that a woman while living with her children in a house belonging to her own Tarwad would not be disentitled to maintenance by occasionally leaving that house in order to visit her husband in his own house. Mr. Moore, referring to this decision in his book on Malabar Law, observes : "It must be admitted that this decision read with that arrived at in *Parvathi* v. *Komaran*[3] leaves the law as to the question in a very doubtful condition. That is, they are not in accordance with any strict doctrine of the right to maintenance being limited to cases where a member lives in the Tarwad house."

Teyyan Nair v. *Raghavan Nair*[4] is an important decision, for it recognises the principle that the right to maintenance is not conditional on a member being of good behaviour. The learned Judges *Innes* and *Tarrant* JJ. observe: "A Tarwad does not differ in this respect from an ordinary Hindu family the manager of which is not entitled to exclude the members from a right to participation in some portion of the income of the family property. The Karnavan's right to require a member to obey him cannot override the latter's right to maintenance." In *Kristnan* v. *Govinda Menon*[5] *Subrahmanya Aiyar* and *Moore* JJ. held that a junior member was not entitled to be paid by the Karnavan the expenses incurred by him for being educated in an English school in a place distant from the Tarwad house. The Karnavan contended that he was not bound to defray the expenses of the plaintiff's education in the English language and that he was willing to give the plaintiff such education in his own place as was practicable there. The suit was framed as one for maintenance generally and the question was not therefore considered whether a person leaving the family house for the purpose of attending a school even though it is not agreed to by the

1. (1881) I.L.R. 4 M. 169.
2. (1899) 9 M.L.J. 153.
3. (1883) I.L.R. 6 M. 341.
4. (1881) I.L.R. 4 M. 171.
5. (1898) 8 M.L.J. 294.

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Karnavan is not entitled to separate maintenance. In *Kesava* v. *Unikkanda*[1] *Brandt* and *Parker* JJ. held that where the Karnavan himself had left the family house separate maintenance might be awarded to a junior who does not live there.

The cases cited above show that where there is substantial inconvenience in living in the family house either on account of want of room there or because there are quarrels which make it uncomfortable to a member to live there, and where there are several houses belonging to the Tarwad and a member lives in one of them, and where the Karnavan's conduct had afforded a valid excuse for a member living away from the Tarwad house, separate maintenance may be awarded. The general result of the decided cases is, in our opinion, that in order that a member of Marumakkathayam or Aliyasantana Tarwad may be entitled to separate maintenance, he or she should be able to allege some good ground for doing so. It would be unwise to hold that the decisions up to date have exhausted the list of good grounds which may be urged. It is the recognised practice in South Canara for a woman and her minor children to live with her husband See *Subbu Hegadi* v. *Tangu*[2] It is a common practice in North Malabar and a growing practice in South Malabar. See *Parvathi* v. *Kumaran.*[3] The interests of social improvement would be against discouraging such a practice. There is no principle in the Marumakkathayam or Aliyasantana law requiring that it should be discouraged. The only principle which has ever been relied on against the award of separate maintenance is that the family property should not be diminished by such award. But this does not require anything more than that in determining the rate of maintenance more should not be allowed than would be received by the claimant if he resided in the family house along with its other members. We are not bound to shut our eyes to the fact that families governed by this system of law are often numerous and consists of persons related in very different degrees of kindred and no social or economical service is done by compelling them all to reside in one house where they have good grounds in not doing so. Several cases have come up to this court which show that in the houses of Rajas and other well-to-do Tarwads, it is the rule to allow separate maintenance. If a member lives away from the Tarwad house for

1. (1887) I.L.R. 11 M. 307. 2. (1869) 4 M.H.C.R. 196.
3. (1883) I.L.R. 6 M. 341.

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an improper purpose that would be a good ground for refusing separate maintenance. What purposes are proper and what improper may be safely left to the decisions of courts. It may happen that the husband of a woman is not able to support her fully. To force her to live in the Tarwad house in such a case under the penalty of being refused all maintenance can only be a disadvantage both to her and to the Tarwad. Similarly where a member willing to earn a part of his maintenance by doing elsewhere work which may not be available near his own house, it would equally be a disadvantage in such a case both to him and to his family if maintenance from the family income were altogether withheld from him. It is not alleged in this case that any of the plaintiffs Nos. 4 to 15 was living away from the family residence for a purpose which can be regarded as otherwise than proper. The suit is one for past maintenance and in such a case it would no doubt be open to the court to infer from the conduct of any of the plaintiffs that he or she waived the right to maintenance during any portion of the period in question. It may be sufficient to show that the conduct of the party was such as to lead to a reasonable inference of waiver of any claim for maintenance against the Ejamanathi; on this point see *Raja Yarlagadda Mallikarjuna Prasad Nayadu* v. *Raja Yarlagadda Durga Prasada Nayadu.*[1] In the absence of such waiver the right to maintenance cannot be refused. The District Munsif was certainly wrong in dividing the total income of the property into as many shares as there are members, and in awarding a $\frac{15}{40}$ th share to the plaintiffs on the principle of an equal share to each member. The Karnavan has to defray the expenses of all ceremonies in the family. He has to keep up the house and other family properties. The principles on which maintenance should be calculated are laid down in the judgment of this court in *Narayani* v. *Govinda*[2] and *Kunhammatha* v. *Kunhi Kutti Ali*[3]. On the conclusion we have come to, it will be necessary for the lower appellate court to decide whether the defendant left the family house as alleged by the plaintiffs. But the question how long any of the plaintiffs resided away from the family house and the circumstances under which he or she did so will have to be decided in order that a conclusion may be come to on the question

1. (1900) I.L.R. 24 M. 147 (P.C.) 2. (1884) I.L.R. 7 M. 352.
3. (1883) I.L.R. 7 M 233.

whether the claim to maintenance for the period in question or any portion thereof can be held to have been waived by any or all of the plaintiffs. Maravadi v. Pamakkar.

With these observations we reverse the decree of the lower appellate court and remand the appeal for fresh disposal in the light of our remarks. The costs in this court will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Pugalia Vettorammal and another .. Appellants*
v. (*1st and 3rd Defts.*)

Vettor Goundan, Minor, by his next friend and mother Poochammal and another .. Respondents (*Plff. & 2nd Deft*).

Vettor Ammal v. Pooch Ammal.

Hindu Law—Joint family—Manager, powers of—Gift of property to coparcener's daughter.

A gift made by a father to his own daughter or by a managing member to the daughter of any of his coparceners, provided it be of a reasonable amount, is valid as against the donor's son.

In an undivided family the manager is in the position of a parent and guardian to the daughters of all the deceased members. It is his duty to give them in marriage as much as it is to give his own daughters in marriage; and no distinction can be drawn between a gift made to the daughter of the donor and one made by him as managing member to the daughter of any of his coparceners.

The gift should be guided by propriety and not by caprice. The propriety of the quantum givable discussed and pointed out.

Held that a gift of Rs. 400, when the family was possessed of Rs. 2,400, to a deceased coparcener's only daughter (the family consisting of the donor and his only minor son the plaintiff) was in the circumstances good; [*Anivillah Sundararamayya* v. *Cherla Sitamma*[1] discussed and commented on. The correctness of the translation of Sloka 175 of Yajnavalkya in *Anivillah Sundararamayya* v. *Cherala Sitamma* [1] questioned.]

Second appeal from the decree of the District Court of Madura in A. S. No. 676 of 1909 presented against the decree of the Court of the District Munsif of Manamadura in O. S. No. 65 of 1908.

M. D. Devadoss for appellants.

T. R. Ramachandra Aiyar for respondents.

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*S. A. No. 534 of 1910. 21st November, 1911.

1. (1911) 21 M.L.J. 695.

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M. D. Devadoss:—The gift to the niece is good on the decisions in *Anivillah Sundararamaya* v. *Cherla Sitamma* [1]; *Kuduthumma* v. *Narasimhacharyulu* [2]; *Ramaswami Aiyar* v. *Vengidusawmi Aiyar* [3]; *Churamon Sahu* v. *Gopi Sahu* [4].

T. R. Ramachandra Aiyar:—The cases cited are distinguishable: (i) as regards the person making the grant; and (ii) the extent of the property. In the reported cases the grantors were father, brother or mother. They are persons having a duty cast on them—MANU, Chapter IX, 116, 192; *Smriti Chandrika* Chapter IV, 15. As to the extent, following one portion of the reasoning, *viz.*, in so far as it is based on the now obsolete right of sister to portion, in this case it is distinctly more than 1/16th which might have been allotted to her. See BURNELL, p. 18; YAJNAVALKYA *Vyavahara Adhyaya* v, 124. All the cases except *Anivilla Sundararamaya* v. *Cherla Sitamma*[1] are distinguishable in that they are connected with marriage one way or other. As for MITHAKSHARA *Vyavahara Adhyaya* v. 175, the translation does not seem to be accurate. There, only the grant of self-acquisition is justified and not of joint property.

M. D. Devadoss replied.

The Court delivered the following

JUDGMENT.—The question of law raised in this second appeal is whether a deed of gift executed by the plaintiff's father in favour of the 1st defendant, the daughter of the donor's deceased undivided brother, is valid and binding as against the plaintiff, the donor's son, according to the Hindu Law. The facts found are that after the death of the 1st defendant's father she and her mother, the 2nd defendant, were under the protection of the plaintiff's father who by survivorship became possessed of the whole of the property which formerly belonged to him and the 1st defendant's father. He maintained the 1st defendant and gave her in marriage, and some years afterwards executed the disputed deed of gift, Exhibit I, in 1897. The plaintiff was and still is a minor. The total extent of the family property in the hands of the plaintiff's father and the value of the property comprised in Exihibit I are in dispute. The finding of the lower courts is that the land given under Exhibit I is worth Rs. 400,

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1. (1911) 21 M. L. J. 695
2. (1907) 17 M. L. J. 528.
3. (1898) I. L.R. 22 M. 113.
4. (1909) I. L. R. 37 C. 1.

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and that the aggregate of the family property at the time of the gift was worth Rs. 2,400, so that the gift to the 1st defendant was of one-sixth of the property in the hands of the donor. We must accept that finding. The lower courts held that Exhibit I was invalid as against the plaintiff, being of opinion that the gift not having been made at the time of the marriage of the 1st defendant, the plaintiff's father had no right to make it under the Hindu Law.

Two contentions have been urged before us at the hearing of this second appeal, preferred by the 1st and 3rd defendants:—

(i) That the judgments of the lower courts are not in accordance with the latest exposition of the law by this court regarding gifts made to a daughter of an undivided member of a family; and

(ii) That the proportion of the family property given to the 1st defendant is not excessive.

Mr. T. R. Ramachandra Aiyar, the learned vakil for the 1st respondent, while admitting that the recent decisions of this court have upheld gifts of family property made to a girl born in a Hindu family, contends that there has been no instance where the court has maintained a gift made by any one other than the father, mother and brother of the donee, and contends that such a gift, if made by an uncle, is invalid. He relies on the text of Yajnavalkya, Sloka 118, referred to by Vignaneswara, in dealing with the separate property of a woman: "what was given to a woman by the father, the mother, the husband or a brother * * * is denominated a woman's property," and Vignaneswara's own commentary on the sloka [see Chapter I, S. 11, Pl. 2 of Colebrook's Translation of the *Mitakshara*]. He also contends that even if a gift to the donor's daughter could be valid, the plaintiff's father had no right to give so large a proportion as one-sixth of the total property belonging to himself and his son. Mr. Devadoss, counsel for the appellants, strongly relies on a note of *Krishnaswami Aiyar* J. which that learned Judge had prepared as his judgment in S. A. No. 572 of 1909 before he ceased to be a judge of this court. The judgment in that case, of *Munro* and *Sankaran Nair* JJ., is reported in *Anivillah Sundararamaya*

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v. *Cherla Sitamma* [1] and *Krishnaswami Aiyar* J's. note is appended to the report of the judgment. Mr. Devadoss contends that, according to the opinion of that learned Judge, any gift by the manager in favour of a girl born in the family would be valid as against the donor's son provided it is made so as not to reduce the donor's family to want by giving away everything belonging to the family, and that the gift made in this case cannot be regarded as excessive. We do not think that the authority of *Krishnaswami Aiyar* J's. note will carry the appellant's case so far. As a matter of fact the question, what portion of the family property may be validly given away to a girl, did not arise for decision in the case. It was not contended that the proportion was excessive in that case, and the only question was, whether the father could make a gift at all of ancestral lands in favour of his daughter. *Krishnaswami Aiyar* J's. conclusion was merely that there is abundant textual authority for the view that gifts of property, moveable or immoveable and common to the father and the son, to the daughter are treated as obligatory, and if they do not exceed a small proportion, having regard to the provision that the gift should not cause detriment to the family, such gifts would be valid and must be upheld. No doubt the learned Judge, referring to certain passages of the *Mitakshara*, does observe: "These passages which have remained untranslated, are a strong indication that so far as the son is concerned, it is only when a father makes a gift of everything belonging to the family that a son (being himself, according to the archaic law, the property of the father) has a right of interdiction." And again: "The general rule as to what is common not being capable of gift does not appear to me to prohibit a gift by the father as against the son when the gift is made without detriment to the family * * * . The statement in the *Mitakshara*, Chapter I, S. 5, Pl. 9 and 10, that the son has a right of interdiction against the father's donation must be reconciled with the statement of the *Mitakshara* in the commentary on sloka 175 of Yajnavalkya already referred to in the light of the explanation suggested by the *Subodini* that it is probably intended to prevent dissipation of the property by the father." Mr. Devadoss, apart from relying on the authority of *Krishnaswami Aiyar* J., contends that the text of Yajnavalkya referred

1. (1911) 21 M. L. J. 695.

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to by the learned Judge, sloka 175, is strong authority in favour of his client that a gift even of a considerable portion of the family property by a father is valid as against his son provided it does not seriously prejudice the son by depriving him of the means of comfortable living.

It must be admitted that some portions of the language used by the learned Judge support this argument. And his view does appear to be that sloka 175 of Yagnavalkya authorizes a father to dispose of ancestral property in favour of a daughter, provided he does so without detriment to the family. Mr. T. R. Ramachandra Aiyar strongly urges that the sloka does not support the view that a father can make any gift of ancestral immoveable property, but lays down the very contrary as, according to it, he can dispose of only his own separate or self-acquired property. As the appellants strongly rely on the text in support of their contention that the gift even of a large fraction of ancestral property must be upheld, we have to consider whether that sloka really supports the appellants' contention, especially as there is no decided case of this court, so far as we are aware, laying down any rule as to the proportion of family property that the father may make a gift of to female members of the family. After the best consideration we are able to give the true meaning of the sloka, we have been constrained to conclude with all deference to *Krishnaswami Aiyar* J., is that it does not support the appellants' contention at all. As the sloka has not been translated in Colebrooke's *Mitakshara* it may be desirable to set out the necessary portion with a translation in English. स्वम् कुटुम्बाविरोधेन देयम् (*svam kutumbavirodhena deyam*). स्वम् (*svam*) may be given without detriment to the family. Now, what is the meaning of the expression स्वम् (*svam*)? Vignaneswara says it means आत्मीयम् (*atmeeyam*), *i. e.*, one's own. The word स्वम् (*svam*) according to *Amara* has two meanings, (1) धनम् (*dhanam*) or property, and (2) आत्मीयम् (*atmeeyam*) or one's own. Vignaneswara adopts for the context not the first meaning of 'property' but the second meaning of 'one's own'. The word आत्मीयम् (*atmeeyam*) means स्वकीयम् (*svakeeyam,*) or one's own. See *Sabdakalpadruma* of Radha Kant Deb. His commentary on the sloka seems to make

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this prefectly clear because he says, commenting on कुटुम्बाविरोधेन (*kutumbavirodhena*) or 'without detriment to the family,' that by that expression Yajnavalkya points out one kind of what may not be given and he then sets out the other kinds of what may not be given as denoted by the word स्वम् (*svam*) namely, अन्वहितयाचितकाधिसाधारणनिक्षेपाणां पञ्चानामप्यदेयत्वम् (*anvahitayachit kadisadhar ananikshepanam panchanamapya deyatvam*), that is, what is deposited to be passed on to another, obtained as a present, a pledge, *sadharana* (that is, common property) and a deposit, these five which are not स्वम् (*svam*) should not be given. The author therefore clearly states that *sadharana* or common property should not be given. The word साधारण (*sadharana*) is stated in the *Sabdakalpadruma* to be synonymous with सामान्य (*samanya*) and to mean according to Amara, अनेकसम्बन्धी एकवस्तु (*aneka sambandhi ekavastu*) one property belonging to more than one, and the author of the work quotes a sloka from the *Dayabhaga* as an illustration. Vignaneswara in his commentary on the sloka proceeds to quote Narada, who says there are eight kinds of things which are not subjects of gift, *viz.*, the five enumerated by the author already, and son, wife and what has been promised to another. The author then points out that the reason why son, wife and what has been promised to another cannot be given, is not that they are not स्वम् (*svam*). A difference is thus made in the reasons for five kinds of property not being givable [namely, that they are not स्वम् (*svam*)] and three other kinds also that are not givable, *sadharana* or common property being one of the five kinds. The *Mitakshara* also says, quoting Yajnavalkya, that the whole property should not be given though it is स्वम् (*svam*), because it has been said: 'One should beget sons and daughters, perform their *samskaras* and create a living for them.' It also quotes, in commenting on the expression 'without detriment to the family,' a text from *Manu* to the effect that 'aged father and mother and an infant son should be maintained even by doing a hundred acts which ought not to be done.' It seems to be perfectly clear from the above that according to Vignaneswara, what is common property should not be given, but only one's own, and that it is an additional restriction on the power of giving that it should be without

detriment to the family, and that the author does not mean that common property may be given without detriment to the family. Colebrooke in his Translation of the text of Narada renders the expression साधारण (*sadharana*) as 'joint property.' See Colebrooke's Digest, 4th Edition, Vol. I, page 401. At page 402, it is stated that 'joint property' is explained in the *Ratnakara* and *Chintamani* as what belongs to more than one owner. And again, at page 405, "joint property is wealth belonging to more than one owner." Misra says 'the gift is invalid because a man has not full dominion over a joint property, a wife, or a son, and the want of dominion in the other instance is deduced from the same reasoning which proves it in the case of joint property.' Misra says, in regard to a son or wife, that "the gift is void for want of full dominion"—see page 406. Apararka, in his commentary on *Yajnavalkya Smrithi* also takes the same view of the meaning of the sloka, namely, that joint property cannot be given. He interprets स्वम् (*svam*) as meaning स्वकीयम् (*svakeeyam*) which evidently means one's own. He quotes a text of Brihaspati that सामान्य (*samanya*) which, as already pointed out, is the same as साधारण (*sadharana*), should not be given. And Apararka explains सामान्य (*samanya*) as meaning having several owners. He also says that property descended from grandfather, &c., should not be given while there are sons. Apararka also cites Narada's text already referred to. It may be noted that Apararka confines the injunction against giving away 'the whole during the existence of progeny' as preventing such giving only before partition of the inheritance and says that 'when the sons have divided the inheritance, a gift of the entire property is not forbidden.' A text from Daksha is also cited in Colebrooke's Digest forbidding the gift of joint property—see page 409, Vol. I. We must, for the reasons mentioned above, hold that sloka 175 of Yajnavalkya does not support the appellants' contention and cannot be relied on to throw any light on the question as to what proportion of the property may be given by a father to a girl of the family. We have, however, no doubt that a gift made by a father to his own daughter or the daughter of an undivided brother, provided it be of a reasonable amount, is valid as against his son and that the question is really covered by authority. We cannot accept Mr. T. R. Ramachandra Aiyar's argument that

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only a gift by the father, mother or brother of the donee is valid. Property given by other relations is clearly recognised as *stridhanam* property though sloka 118 of Yajnavalkya expressly refers only to gifts made by the relations specified above :—"That which has been given to her by her kindred: as well as her fee or gratuity or anything bestowed after marriage"—(see *Mitakshara*, Chapter II, S. 11, Pl. 6. In undivided family, the manager is in the position of parent and guardian to the daughters of all the deceased members. It is his duty to give them in marriage as much as it is to give his own daughters in marriage. S. 7 of Chapter I of the *Mitakshara* providing for portions to sisters, when a partition is made between brothers after the death of the father is only illustrative and does not exclude the rights of the daughters of the deceased co-parceners. All girls born to any of the co-parceners stand on the same footing. The allotment of a share to the daughters in the family is regarded as obligatory by Vignaneswara In Chapter I, S. 7, P. 10 and 11, he says: "The allotment of such a share appears to be indispensably requisite, since the refusal of it is pronounced to be a sin." And he cites the text of *Manu*, 'they, who refuse to give it, shall be degraded'—*Manu*, Chapter IX, S. 118. The author repeats in Placitum 11 that the withholding of a portion is pronounced to be a sin. In the *Madhaviya*, pages 41 and 42, (Burnell's Translation) a text of Katyayana is cited authorizing the gift of immoveable property by a father to his daughters besides a gift of moveables up to the amount of 2,000 fanams a year. The commentator says: "But this (that is, 2,000 fanams a year) is not a rule of limitation in the case of a payment made once for all on account of subsistence for several years, nor is there a prohibition regarding immoveable property (in that case)." See also *Vyavahara Mayukha*, page 93 (Mandlik's Translation). A text of Brihaspati is also cited by the author of the *Madhaviya* to the same effect:—"Let him give adequate wealth and a share of land also if he desires." See page 344, Part I, Hindu Law Books on *Inheritance*: Messrs. V. Kalyanarama Iyer & Co's Edition. Devala says :—"To maidens should be given a nuptial portion of the father's estate"—Colebrooke's Digest, Vol. I, p. 185. Manu's well known text may also be referred to:—"To the unmarried daughters by the same mother let their brothers give portions out of their allotments respectively

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according to the class of their several mothers. Let each give one-fourth part of his own distinct share and those who refuse to give it shall be degraded."

It has been pointed out in *Ramasawmi Ayyar* v. *Vengidusami Ayyar* [1] and *Churamon Sahu* v. *Gopi Sahu*[2] that the interpretation accepted by the principal writers of the Mitakshara School of the text relating to portions to daughters rejects the view propounded by some authors that the text authorizes only the defraying of the marriage expenses of the daughters. Besides, as pointed out by Vignaneswara, "what has been given out of affection to daughters should not be taken back"—see commentary on verse 176. *Mitakshara*, Chapter I, S. 1, verse 29, also lays down that while the sons and grandsons are minors, a person may make gifts for necessary and lawful purpose. The placitum has been explained by *Krishnaswami Aiyar* J. in *Kameswara Sastry* v. *Veeracharlu*,[3] to justify gifts for lawful purposes ordained in accordance with *dharma*. See also BHATTACHARIYA'S *Tagore Law Lectures*, "Joint Hindu Family," page 488.

It is also important to bear in mind, as pointed out in *Ramasami Ayyar* v. *Vengidusami Ayyar*[1] that the usage obtaining in the community by itself would be sufficient to justify such gifts. Nothing is more common than gifts of a small portion of the family property in favour of daughters, and they are generally acquiesced in by the members of the family, though of late there has been a disposition to question them in consequence of the decisions of the courts. No doubt a daughter can no longer claim as of right a share of the property belonging to her father, but the moral obligation to provide for her wherever possible is fully recognized by the Hindu community and will support in law any disposition for the purpose made by the father.

Turning now to the decided cases on the subject, the Judicial Committee of the Privy Council held in *Bachoo* v. *Mankorebai*,[4] that a gift by a father, possessing large property, of a sum of Rs. 20,000 to his daughter was valid and their Lordships confirmed the decision of the Bombay High Court in *Bachoo* v. *Mankorebai*[5] in which *Jenkins*, C. J. and *Russell* J., reversing the Judgment of *Tyabji*, J. upheld the gift. The learned Judges relied on

1. (1898) I. L. R. 22 M. 113.
2. (1909) I. L. R. 37 C. 1.
3. (1910) 20 M. L. J. 855.
4. (1907) I. L. R. 31 Bom. 373.
5. (1904) I. L. R. 29 Bom. 51.

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Placitum 27, S. 1, Chapter I, of the *Mitakshara* authorizing the father to dispose of moveables at his pleasure even where they are ancestral. They also referred to a text in the *Viramitrodaya*, Chapter VII, S. 5: 'Gifts by the parents out of favour or affection should be guided by propriety, but not by caprice,' as well as a text in the *Mayukha*, Chapter IV, S. 7, Pl. 11 to 13, referring to gifts through affection made by a father. The plaintiff in the suit who objected to the gift was not the son of the donor but the adopted son of his brother, but the learned Judges held that the texts were applicable to such a case. In *Ramasami Ayyar* v. *Vengidusami Ayyar* [1] the mother of a deceased infant proprietor succeeding to his property, as here, made a gift of lands to her daughter at marriage. *Subrahmanya Aiyar* and *Moore* JJ. upheld the gift both on the authority of the text of the *Mitakshara* relating to the right of girls to marriage portions and on custom. In *Kudutamma* v. *Narasimha Charyulu*[2] *Wallis* and *Miller* JJ. maintained a gift by a brother, the managing member of the family, though it was not made at the time of the marriage, following the judgment in *Ramasami Ayyar* v. *Vengidusami Ayyar*[1]. *Wallis* J. regards the power to give as residing in every managing member of the family with respect to a girl belonging to the family. *Munro* and *Sankaran Nair*, JJ. in the case already mentioned, *Anivillah Sundararamayya* v. *Cherla Seethamma*,[3] supported a gift by the father made to the daughter long after the marriage; the learned Judges overruled the contention that the Hindu Law texts support only gifts to the daughter's husband as bridegroom and not to the daughter herself. They also pointed out that no distinction could be drawn in the present day between gifts of moveable and of immoveable property.

We are of opinion that no distinction can be drawn between a gift made to the daughter of the donor and one made by him as managing member to the daughter of any of his co-parceners. Is *Churamon Sahu* v. *Gopi Sahu* [4] *Mookerjee* and *Carnduff* JJ. maintained the validity of a gift by a Hindu widow to her daughter on the occasion of her *dwiragaman* ceremony, that is, the occasion of the second entrance of the bride into the house of

1. (1908) I. L. R. 22 M. 113.
2. (1907) 17 M. L. J. 528.
3. (1911) 21 M.L.J. 695.
4. (1909) I.L.R. 37 C. 1.

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her husband from that of her father after the celebaration of the marriage. The texts of Manu, Davala and Yagnavalkya already referred to are cited by the learned Judge, and the prior decisions of this court are approved and followed. In *Hanmuntappa* v. *Jivubai* [1] a gift of moveables by a father to his daughther-in-law was held binding as against his sons. The decision was partly based on the father's special right over moveable property, but reliance is also placed on the text of the *Mitakshara* permitting gifts out of affection ahd pious and charitable gifts and on the decision in *Raghunatha Prasad* v. *Gobind Prasad*[2] which upheld a provision made out of joint ancestral property by the father for a family idol.

We are, for the reasons mentioned above, of opinion that the plaintiff's father was competent to make a gift of ancestral property to the 1st defendant, his brother's daughter.

The question whether the gift should be set aside on the ground of its being excessive presents more practical difficulty. The text of Yajnavalkya in Chapter 1, S. 7, Pl. 5, of the *Mitakshara* as interpreted by Vignaneswara defines the share of a daughter as one-fourth of what she would be entitled to if she were a son. The *Smrithi Chandrika*, in Chapter IV, cites a text of Katyayana which says: "For the unmarried daughters a quarter is allowed and three parts for the sons, but where the property is small, the portion is considered to be equal. The author of the *Smriti Chandrika* says (Placitum 28): " The meaning of the fourth or last portion of the above text, para 26, is that where the estate is small the share of each sister is considered by Vishnu and others as being equal to that of a son. Reference has already been made to the observation of Vignaneswara in his commentary on slokas 175 and 176 of Yajnavalkya that it is the duty of a father to provide for his daughters as well as for his sons. The text of Yajnavalkya defining the share of the daughter is no longer legally in force though it would afford a guide in determining whether any particular gift which is impeached is reasonable or not. As observed in the *Viramitrodaya* in the text cited in *Bachoo* v. *Mankorebai*[3] the gift should be guided by propriety but not by caprice. It would be hardly right to

1. (1900) I.L.R. 24 Bom. 547. 2. (1885) I.L.R. 8 A. 76.
3. (1904) 29 Bom. 51.

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lay down the hard and fast rule that nothing more than a fourth share of what the daughter would get if she were a son can be given in any case as apparently attempted to be done in *Damodar Misser* v. *Senabutty Misrain*,[1]. The social condition existing at the time of the gift would be a proper matter to be taken into account; and where the property is very small and the expenses of marriage heavy in the community of the parties, it may not be improper to allot a share equal to that of the son for the expenses of marriage and for dowry together. At the same time, where the property is very large, worth say several lakhs of rupees, the courts may not be prepared to uphold a gift of the share permissible according to the text of Yajnavalkya. The right of the daughter not being confined, as pointed out in *Ramasami Ayyar* v. *Vengidusami Ayyar*[2] and *Churamon Sahu* v. *Gopi Sahu*[3] to have the expenses of her marriage defrayed, it might be reasonable to allot something more than such expenses even where they are comparatively heavy. At the same time, it would not be fair to the sons that the father, after spending a large amount on the marriage of his daughter, should make a gift of any considerable property to her. It must also be borne in mind that it would be unfair to the daughter that she should be told that her claim has been absorbed by excessive expenditure on marriage contracted by members of the family not for her benefit but to enable the co-parceners to maintain their social prestige. In *Churamon Sahu* v. *Gopi Sahu*[3] the Calcutta High Court upheld the gift of one-third of the family property on the occasion of the *dwiragaman* ceremony. The learned Judges observe that the question must be determined with regard to the circumstances of each particular disposition. They refer to a case reported in 2 Morley's Digest, 198, and cite the observation of *Lord Gifford* in that case that it was absolutely impossible to define the extent and limit of the power of disposition because it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such dispositions. In *Anivillah Sundararamaya* v. *Cherla Sitamma*[4] another principle is indicated. The learned Judges say: "Here if the father had enforced a partition, he would have admittedly got not less than

1. (1882) 8. Cal. 537.
2. (1898) 22 Mad. 113.
3. (1909) I.L.R. 37 Cal. 1.
4. (1911) 21 M. L. J. 956.

one hundred acres and it is impossible to say that a gift of 8 acres is unreasonable." We are unwilling to adopt this test based upon the father's right to dispose of what he gets for his own share on partition for deciding the question what disposition he might make while remaining a member of an undivided family. We think it must be left to the court in each case to decide whether the gift is reasonable in all the circumstances under which it is made. In this case, the donor, at the time of the gift, had only one son, and he was an infant. The share given to the 1st defendant was one-sixth of the whole. It was apparently considered by the donor that the property still left to the family would have time to increase before his son would have to support a family. He died undivided from his son, and apparently never wished to be divided from him. One eighth share of the property would be a suitable portion for the 1st defendant under such circumstances according to Yajnavalkya's text. What was given was one-sixth or one-twenty-fourth more, worth Rs. 100. We are not prepared to say that an excessive portion of the property was given.

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The result is that we must reverse the decrees of the courts below and dismiss the suit but, in the circumstances, the parties will bear their own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:— Mr. Justice Abdur Rahim on a difference between Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Emperor .. .. Appellant*

v.

Mushnooru Suryanarayana Murthy .. Accused.

Emperor v. Suryanarayana Murthy.

Penal Code, Ss. 299, 300, 301—*S.* 301, *scope of*—"*Causes death,*" *meaning of—Intending death of one and causing death of another—Intervening human agency.*

The accused gave some sweetmeat with poison intermixed to *A* with a view of causing *A's* death. *A* ate a little and threw it away and it was picked up by *R* without the knowledge of the accused and eaten by her; and as the result thereof *R* died.

Held per *Benson* and *Abdur Rahim* JJ. (*Sundara Aiyar* J. dissenting) that the accused was guilty of murder.

Per *Benson* J. :—It is enough if the accused causes the death of any one by doing an act with the intention of "causing death" to any one. It is not necessary that death should be caused directly by the action

* Cr. A. No. 32 of 1912. 2nd January 1912.

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of the offender without contributory action by the person whose death is caused or by some other person. It is sufficient if death is actually, even though involuntarily, caused to one person by an act intended to cause the death of another.

Meaning of the phrase "causes the death," dwelt on

Per *Sundara Aiyar* J. :—S. 301 does not apply where the death both of the person whose death was in contemplation and of another person or persons have occurred. Ordinarily a man is not criminally responsible for the act of another and his act cannot ordinarily be the cause of a consequence which would not result without the intervention of another human agency; and the accused in the case was not guilty of culpable homicide by doing an act which *caused* the death of the girl (another human, agency having intervened).

Per *Abdur Rahim* J. :—It is not possible to lay down any general test as to what should be regarded in criminal law as the responsible cause of a certain result when that result, as it often happens, is due to a series of causes. The relative value and efficiency of the different causes in producing the effect has to be considered in each case. It cannot be a sufficient criterion to test a particular cause by asking whether effect could have been produced in the case in question without it; nor would it be correct to lay down generally that the intervention of a voluntary agent must necessarily absolve the person between whose act and the result it intervenes.

Appeal under S. 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused on the first count of murder in S. C. No. 14 of 1910 by the Sessions Judge of Ganjam Division.

The Public Prosecutor (*C. F. Napier*) for the Crown:—In the Indian Penal Code no less than in the English Law, to constitute murder the intention to cause death, or knowledge of likelihood of death by the means adopted, and the resulting death, is all that is required. The person dying need not be the very person intended to be killed. The fact that the proximate cause of the act is the will of another being with volition, is also immaterial when the means adopted are calculated to cause death and has caused death—HALE'S *Pleas of the Crown* 436; *Agnes Gore's Case*[1]; HALSBURY, Vol. 9, p. 572; *Regina* v. *Latimer*[2]; STEPHEN'S *Commentaries*, Vol. I, p. 8, and CLERK AND LINDSELL, pp. 134, 135 do not show the contrary.

K. N. Aiya for the accused submitted that the act was not his that killed the child nor was it a consequence that was contemplated by him, nor was it a likely event 13 W. R. cr. L. P. 2 was the only Indian case and seemed to be against him.

1. (1614) 77 E. R. 852

2. (1886) 17 Q. B. 359.

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The Court delivered the following

JUDGMENT :—*Benson* J.:—This is an appeal by the Public Prosecutor on behalf of Government against the acquittal of one Suryanarayana Murthi, on a charge of having murdered the girl, Rajalakshmi.

The facts of the case, so far as it is necessary to state them for the purposes of this appeal, are as follows :—

The accused, with the intention of killing Appala Narasimhulu, (on whose life he had effected large insurances without Appala Narasimhulu's knowledge, and in order to obtain the sums for which he was insured), gave him some sweetmeat (halva) in which a poison containing arsenic and mercury in soluble form had been mixed. Appala Narasimhulu ate a portion of the sweetmeat, and threw the rest away. This occurred at the house of the accused's brother-in-law where the accused had asked Appala Narasimhulu to meet him. Rajalakshmi, who was aged 8 or 9 years, and who was niece of the accused, being the daughter of accused's brother-in-law, took some of the sweetmeat and ate it and gave some to another little child who also ate it. According to one account Rajalakshmi asked the accused for a portion of the sweetmeat, but according to the other account, which we accept as the true account, Appala Narasimhulu, after eating a portion of the sweetmeat threw away the remainder, and it was then picked up by Rajalakshmi without the knowledge of the accused. The two children who had eaten the poisoned sweetmeat, died from the effects of it, but Appala Narasimhulu, though the poison severely affected him, eventually recovered. The accused has been sentenced to transporation for life for having attempted to murder Appala Narasimhulu. The question which we have to consider in this appeal is whether, on the facts stated above, the accused is guilty of the murder of Rajalakshmi.

I am of opinion that the accused did cause the death of Rajalakshmi and is guilty of her murder. The law on the subject is contained in Ss. 299 to 301 of the Indian Penal Code and the whole question is whether it can properly be said that the accused "caused the death" of the girl, in the ordinary sense in which those words should be understood, or whether the accused was so indirectly or remotely connected with her death that he cannot

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properly be said to have "caused" it. It is not contended before us that the accused intended to cause the death of the girl, and we may take it for the purpose of this appeal that he did not know that his act was even likely to cause her death. But it is clear that he did intend to cause the death of Appala Narasimhulu. In order to effect this he concealed poison in a sweetmeat and gave it to him eat. It was these acts of the accused which caused the death of the girl, though no doubt her own action, in ignorantly picking up and eating the poison, contributed to bring about the result. S. 299 of the Indian Penal Code says : "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." It is to be observed that the section does not require that the offender should intend to kill (or know himself to be likely to kill) any particular person. It is enough if he "causes the death" of any one by doing an act with the intention of "causing death" to any one, whether the person intended to be killed or any one else. This is clear from the first illustration to the section, "*A* lays sticks and turf over a pit, with the intention of thereby causing death, or with the knowledge that death is likely to be thereby caused *Z* believing the ground to be firm, treads on it, falls in and is killed. *A* has committed the offence of culpable homicide."

Nor is it necessary that the death should be caused directly by the action of the offender, without contributory action by the person whose death is caused or by some other person. That contributory action by the person whose death is caused will not necessarily prevent the act of the offender from being culpable homicide, even if the death could not have occurred without such contributory action, is clear from the above illustration, and that contributory action by a third person will not necessarily prevent the act of the offender from being culpable homicide, even if the death could not have occurred without such contributory action, is clear from the second illustration, *viz.*, "*A* knows *Z* to be behind a bush. *B* does not know it. *A*, intending to cause, or knowing it to be likely to cause, *Z*'s death, induces *B* to fire at the bush. *B* fires and kills *Z*. Here *B* may be guilty of no offence; but *A* has committed the offence of culpable homicide.

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The language of the section and the illustration seem to me to show that neither the contributory action of Appala Narasimhulu in throwing away part of the sweetmeat, nor the contributory action of the girl in picking it up and eating it prevent our holding that it was the accused who caused the girl's death. The Indian Law Commissioners in their report (1846) on the Indian Penal Code call attention to the unqualified use of the words "to cause death" in the definition of culpable homicide, and rightly point out that there is a great difference between acts which cause death immediately, and acts which cause death remotely, and they point out that the difference is a matter to be considered by the courts when estimating the effect of the evidence in each case. Almost all, perhaps all, results are caused by a combination of causes, yet we ordinarily speak of a result as caused by the most conspicuous or efficient cause, without specifying all the contributory causes. In Webster's Dictionary "cause" is defined as "that which produces or effects a result; that from which anything proceeds and without which it would not exist", and again "the general idea of cause is that without which another thing, called the effect, cannot be; and it is divided by Aristotle into four kinds known by the name of the *material*, the *formal*, the *efficient* and the *final* cause. The *efficient* cause is the agent that is prominent or conspicuous in producing a change or result."

In the present case I think that the accused's action was the efficient cause of the girl's death, though her own action in picking up and eating the poison was also necessary in order to effect her death; just as in the illustration given in the Code the man who laid the turf and sticks over the pit with the intention of causing death was held to be the cause of the death of the man who ignorantly fell into the pit; although the death would not have occurred if he had not of his own free will walked to the spot where the pit was. The Code says that the man who made the pit is guilty of culpable homicide, and, in my opinion, the accused in the present case, who mixed the poison in sweetmeat and gave it to be eaten, is equally guilty of that offence. The *mens rea* which is essential to criminal responsibility existed with reference to the act done by the accused in attempting to kill Apala Narasimhulu, though not in regard to the girl whose death he, in fact, caused, and that is all that the section

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requires. It does not say "whoever voluntarily causes death," or require that the death actually caused should have been voluntarily caused. It is sufficient if death is actually, even though involuntarily, caused to one person by an act intended to cause the death of another. It is the criminality of the intention with regard to the latter that makes the act done and the consequence which follows from it an offence.

Turning now to S. 300, Indian Penal Code, we find that culpable homicide is murder if the act by which death is caused is done with the intention of causing death, and does not fall within certain specified exceptions, none of which are applicable to the present case.

It follows that the accused in the present case is guilty of murder, and this is rendered still more clear by S. 301 of the Code. The cases in which culpable homicide is murder under S. 300 are not confined to cases in which the act by which the death is caused is done with the intention of causing death. S. 300 specifies other degrees of intention or knowledge which may cause the act to amount to murder, and then S. 301 enacts that "if a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause."

The section does not enact any rule not deducible from the two preceding sections, but it declares in plain language an important rule deducible, as we have seen, from those sections, just as an explanation to a section does. The rule could not well be stated as an explanation to either S. 299 or S. 300 as it relates to both. It was, therefore, most convenient to state the rule by means of a fresh section. The rule makes it clear that culpable homicide may be committed by causing the death of a person whom the offender neither intended, nor knew himself to be likely, to kill, a rule which though it does not lie on the surface of S. 299, yet is, as we have seen, deducible from the

generality of the words "causes death" and from the illustration to the section; and the rule then goes on to state that the *quality* of the homicide, that is, whether it amounts to murder or not, will depend on the intention or knowledge which the offender had in regard to the person intended or known to be likely to be killed or injured, and not with reference to his intention or knowledge with reference to the person actually killed, a rule deducible from the language of the Ss. 299 and 300 though not, perhaps, lying on their very surface. The conclusion, then, at which I arrive is that the accused in this case is guilty of murder as defined in Ss. 299 to 301, Indian Penal Code.

This conclusion is in accord with the view of *Norman*, Offg., C. J., and *Jackson*, J., in the case reported in 13 W. R. Criminal Letters, p. 2, where it is said: "The prisoner gave some poisoned rice water to an old woman who drank part herself and gave part to a little girl who died from the effect of the poison. The offence of the prisoner, under S. 301 of the Indian Penal Code, is murder." That the present accused would be guilty of murder under English Law is clear from the case of *Agnes Gore*. In that case Agnes Gore mixed poison in some medicine sent by an Apothecary, Martin, to her husband, which he ate but which did not kill him, but afterwards killed the Apothecary, who to vindicite his reputation, tasted it himself, having first stirred it about. "It was resolved by all the Judges that the said Agnes was guilty of the murder of the said Martin, for the law conjoins the murderous intention of Agnes in putting the poison into the electuary to kill her husband, with the event which thence ensued; *i. e.*, the death of the said Martin; for the putting of the poison into the electuary is the occasion and cause; and the poisoning and death of the said Martin is the event, *quia eventus est qui ex causa sequitur, et dicuntur eventus quia ex causis eveniunt*, and the stirring of the electuary by Martin with his knife without the putting in of the poison by Agnes could not have been the cause of his death." (King's Bench 77 English Reports, p. 853 at page 854).

A number of other English cases have been referred to, but it is unnecessary to discuss them as we must decide the case in accordance with the provisions of the Indian Penal Code, and these are not necessarily the same as the English Law.

In the result, I would allow the appeal by Government and convict the accused of the murder of Rajalakshmi.

The accused was originally sentenced to seven years' rigorous imprisonment for having attempted to murder Appala Narasimhulu. This sentence was enhanced to one of transportation for life by this court acting as a court of revision in December, 1910, when this appeal was not before them. Looking to these facts I am unwilling to now impose a sentence of death, though it would have been appropriate if the accused had been convicted of murder at the original trial.

Sundara Aiyar J.—In this case the accused Suryanarayana Murthi was charged by the Sessions Court of Ganjam with the murder of a young girl named Rajalakshmi and with attempt to murder one Appala Narasimhulu by administering poison to each of them on the 9th February 1910. He was convicted by the Sessions Court on the latter count but was acquitted on the former count and was sentenced to seven years' rigorous imprisonment. He appealed against the conviction and sentence in Criminal Appeal No. 522 of 1910, and this court confirmed the conviction and enhanced the sentence to transportation for life. The present appeal is by the Government against his acquittal on the charge of murdering Rajalakshmi.

The facts as found by the lower court are that the accused, who was a clerk in the Settlement Office at Chicacole, got the life of Appala Narasimhulu, the prosecution 1st witness, insured in two Insurance Companies for the sum of Rs. 4,000 in all, having paid the premia himself; that the 2nd premium for one of the insurances fell due on the 12th January, 1910, and the grace period for its payment would elapse on the 12th February, 1910; that the prosecution 1st witness being at the same time badly pressed for means of subsistence asked the accused for money on the morning of 9th February; that the latter asked him to meet him in the evening at the house of his (the accused's) brother-in-law, the prosecution 8th witness; that at the house the accused gave the prosecution 1st witness a white substance which he called 'halva' but which really contained arsenic and mercury in soluble form; that the prosecution 1st witness having eaten a portion of the *halva* threw aside the rest; that it was picked up by the daughter of the prosecution 8th witness, the

deceased Rajalakshmi, who ate a portion of it herself and gave another portion to a child of a neighbour; and that both Rajalakshmi and the other child were seized with vomiting and purging and finally died, Rajalakshmi some four days after she ate the *halva* and the child two days earlier. After the prosecution 1st witness had thrown away the *halva* both he and the accused went to the bazaar and the accused gave prosecution 1st witness some more *halva*. The prosecution 1st witness suffered in consequence for a number of days but survived. The accused, as already stated, has been sentenced to transportation for life for attempting to murder the prosecution 1st witness.

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The case for the prosecution with reference to the poisoning of Rajalakshmi was, as sworn to by the prosecution 1st witness, that, when the accused gave him the *halva*, the girl asked for a piece of it and that the accused, though he reprimanded her at first, gave her a small portion. But I agree with the learned Sessions Judge that this story is improbable. The girl was the accused's own niece being his sister's daughter. He and her father (the prosecution 8th witness) were on good terms. He had absolutely no motive to kill her, and there was no necessity for giving her the *halva*. The accused, in his statement to the Magistrate (the prosecution 22nd witness) soon after the occurrence, said that the girl had picked up the *halva* and eaten it. He had made a similar statement to the prosecution 8th witness when the latter returned to his house on the evening of the 9th immediately after the girl had eaten it. This statement is in accordance with the probabilities of the case, and I accept the Sessions Judge's finding that the *halva* was not given to the girl by the accused but picked up by her after the prosecution 1st witness had thrown it way. The question we have to decide is whether, on these facts, the accused is guilty of the murder of the girl. At the conclusion of the arguments we took time to consider our judgment, as the point appeared to us to be one of considerable importance, but we intimated that, even if the accused should be held to be guilty of murder, we would not consider it necessary, in the circumstances, to inflict on him the extreme penalty of the law.

It is clear that the accused had no intention of causing the death of the girl Rajalakshmi. But it is contended that the

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accused is guilty of murder as he had the intention of causing the death of the prosecution 1st witness, and it is immaterial that he had not the intention of causing the death of the girl herself. S. 299, Indian Penal Code, enacts that 'whoever causes death by doing an act with the intention of causing death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." S. 300 says "culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death." S. 301 lays down that "if a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person whose death he intended or knew himself to be likely to cause." The contention of the learned Public Prosecutor, to put it very shortly, is (1) that it was the accused's act that caused the death of the girl and (2) that the accused had the intention of causing death when he gave the poison to the prosecution 1st witness and was, therefore, guilty of any death that resulted from his act. He urges that the sections of the Penal Code practically reproduce the English Law according to which the causing of death with malice aforethought, though the malice may not be directed against a particular individual whose death ensues, would amount to murder. Before referring to the English Law, I shall consider the provisions of the Penal Code bearing on the subject. If Mr. Napier's contention be sound it would make no difference whether Appala Narasimhulu, the prosecution 1st witness, also died in consequence of the poison or not; nor would it make any difference if, instead of the poison being picked up by the girl and eaten by herself, she gave it to some one else and that one to another again and so on if it changed any number of hands. The accused would be guilty of the murder of one and all of the persons who might take the poison, though it might have been impossible for him to imagine that it would change hands in the manner that it did. The contention practically amounts to saying that the intervention of other agencies, and of any number of them, before death results, would make no difference in the guilt of the accused, that

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causing death does not mean being the proximate cause of death, but merely being a link in the chain of the cause or events leading to the death and that further any knowledge on the part of the accused that such a chain of events might result from his act is quite immaterial. It is, *prima facie*, difficult to uphold such an argument. Now is there anything in the sections of the Penal Code to support it? S. 39 provides that "a person is said to cause an effect 'voluntarily' when he causes it by means whereby he intended to cause it, or by means which, at the time of employing those means, he knew or had reason to believe to be likely to cause it." The illustration to the section is that if a person sets fire by night to an inhabited house in a large town for the purpose of facilitating robbery, and thus causes the death of a person, he would be taken to have caused the death voluntarily if he knew that he was likely to cause it even though he may not have intended to cause death and may even be sorry that death had been caused by his act. The section and the illustration both show that causation with respect to any event involves that the person should have knowledge that the event was likely to result from his act. S. 299, Indian Penal Code, in my opinion, does not lead to a different conclusion. But before dealing with it, I must turn to S. 301, Indian Penal Code. That section apparently applies to a cause where the death of the person whose death was intended or known to be likely to occur by the person doing the act, does not, as a fact, occur but the death of some one else occurs as the result of the act done by him. It evidently does not apply where the death both of the person whose death was in contemplation and of another person or persons, had occurred. Can it be said that, in such a case, the doer of the act is guilty of homicide with reference to those whose death was not intended by him and could not have been foreseen by him as likely to occur? Are we to hold that a man who knows that his act is likely to cause the death of one person is guilty of the death of all the others who happen to die, but whose death was far beyond his imagination? Such a proposition it is impossible to maintain in criminal law. S. 301 of the Indian Penal Code has reference to a case where a person intending to cause the death of *A*, say by striking or shooting him, kills *B* because *B* is in the place where he imagined *A* to be, or *B* rushes in to save *A* and receives the injury intended for *A*. The reason for

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not exculpating the wrong-doer in such cases is that he must take the risk of some other person being in the place where he expected to find *A*, or, of some one else intervening between him and *A*. The section is a qualification of the rule laid down in S. 299 and is evidently confined to cases where the death of the person intended or known to be likely to be killed does not result. If the Public Prosecutor's general proposition were right, S. 301 of the Indian Penal Code would seem to be unnecessary, as S. 299 would be quite enough. If a person is intended by S. 299 to be held to be guilty for deaths which are not known to be likely to occur, then that section might itself have been worded differently so as to show that the particular death caused need not have been intended or foreseen and what is more important, S. 301 of the Indian Penal Code would not be limited to cases where the death of the particular individual intended or foreseen does not occur. The general theory of the criminal law is that the doer of an act is responsible only for the consequences intended or known to be likely to ensue; for otherwise he could not be said to have caused the effect "voluntarily," and a person is not responsible for the involuntary effects of his acts. Illustrations *A* and *B*, in my opinion, support this view. Ss. 323 and 324 show that a person is responsible in the case of hurt or grievous hurt only for what he causes voluntarily; and S. 321 shows that hurt to the particular person in question must have been intended or foreseen. In the eye of the law, no doubt, a man will be taken to have foreseen what an ordinary individual ought to foresee, and it will not be open to him to plead that he himself was so foolish as, in fact, not to foresee the consequence of his act. A person might, in some cases, be responsible for effects of which his act is not the proximate cause where the effect is likely to arise in the ordinary course of events to result from the act. This rule will certainly hold good where a person's act set in motion only physical causes which lead to the effects actually occurring; when the effect is not due merely to physical causes set in operation by an act, but other persons' wills intervening are equally necessary causes with the original act to lead to the result, it is more difficult to decide whether the act in question can be said to be the cause of the effect finally produced. The Code throws very little light on the question. Ordinarily, a man

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is not criminally responsible for the acts of another person, and ordinarily his act should not be held to be the cause of a consequence which would not result without the intervention of another human agency. Sir J. FitzJames Stephen in his 'History of the Criminal Law of England,' Vol. III, p. 8, says: "A more remarkable set of cases are those in which death is caused by some act which does unquestionably cause it, but does so through the intervention of the independent voluntary act of some other person. Suppose, for instance, *A* tells *B* of facts which operate as a motive to *B* for the murder of *C*. It would be an abuse of language to say that *A* had killed *C*, though no doubt he has been the remote cause of *C*'s death." The learned author proceeds to point out that, even when a person counsels, procures or commands another to do an act, he would be only guilty as an abettor but not as a principal offender whose act caused the result, say murder. This is the well settled principle of the English Law, though there appear to be one or two exceptions, to be hereafter pointed out. No such exceptions are mentioned in the Indian Code. They may perhaps be recognised where the doer of the act knew that it would be likely that his own act would lead other persons, not acting wrongfully, to act in such a manner as to cause the effect actually produced. But the scope of the exceptions cannot cover those cases where the doer could not foresee that other persons would act in the manner indicated above. This is the principle adopted in determining civil liability for wrongs. See the discussion of the question in *Baker* v. *Snell.*[1] A stricter rule cannot be applied in cases of criminal liability.

Now, can it be said that the accused, in this case, knew it to be likely that the prosecution 1st witness would give a portion of the *halva* to the girl Rajalakshmi? According to S. 26 of the Indian Penal Code "a person is said to have 'reason to believe' a thing if he has sufficient cause to believe that thing but not otherwise." A trader who sells a basket of poisoned oranges may be said to have sufficient 'reason to believe' that the buyer would give them to various persons to eat; but one who gives a slice of an orange to another to eat on the spot could not be said to have sufficient 'reason to believe' that he would give

1. (1908) 2 K. B. 825.

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half of that slice to another person to eat or that he would throw away a portion and that another would eat it. The poison was thrown aside here not by the accused but by the prosecution 1st witness. The girl's death could not have been caused but for the intervention of the prosecution 1st witness's agency. The case, in my opinion, is not one covered by S. 301 of the Indian Penal Code. The conclusion, therefore, appears to follow that the accused is not guilty of culpable homicide by doing an act which caused the death of the girl. Mr. Napier, as already mentioned, has contended that the law in this country on the question is really the same as in England; and he relies on two English cases in support of his contention, *viz.*, *Saunder's case* and *Agnes Gore's case.* I may preface my observations on the English Law by citing Mr. Mayne's remark that "culpable homicide is perhaps the one branch of criminal law in which an Indian student must be most careful in accepting the guidance of English authorities." According to the English Law "murder is the unlawful killing, by any person of sound memory and discretion, of any person under the King's peace, with malice aforethought, either *express or implied by law.* This malice aforethought which distinguishes murder from other species of homicide is not limited to particular ill-will against the persons slain, but means that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief. Any formed design of doing mischief may be called malice; and therefore, not only killing from premeditated hatred or revenge against the person killed, but also, in many other cases, killing accompanied with circumstances that show the heart to be previously wicked is adjudged to be killing of malice aforethought and, consequently, murder."—RUSSELL on *Crimes and Misdemeanours*, 7th Edition, Volume I, page 655. It will be observed that, in this definition, malice is made an essential requisite, and all cases have to be brought under it. Knowledge that the act is likely to cause death is not part of the definition Nor have we any words to import what is contained in the explanations to S. 299 of the Indian Penal Code or in Cls. 2, 3 and 4 of S. 300. The law was worked out of England to its present condition by a series of judicial decisions. This accounts for the statement

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that general malice is enough and that it need not be directed against the particular individual killed. Hence also the proposition that wicked intention to injure is enough and intention to kill that individual is not necessary. See ROSCOE'S *Criminal Evidence*, 13th Edition, pages 617 to 619. Malice again is explained to mean malice implied by law as well as malice in fact. The result is, the law in England is not as different from that in India as a comparison of the definitions might, at first sight, indicate. This is apparent from the statement of the English Law at pp. 20-22, Vol. III of STEPHEN'S *History of the Criminal Law*. The statement, however, shows that the law is not identical in both countries. In England an intention to commit any felony will make the act murder if death results. Again " if a child under years of discretion, a madman, or any other person of defective mind, is incited to commit a crime, the inciter is the principal *ex necessitate*, though absent when the thing was done. In point of law, the act of the innocent agent is as much the act of the procurer as if he were present and did the act himself." See RUSSELL on *Crimes*, Vol. I, page 104. The Indian law does not make the abettor guilty of the principal offence in such circumstances. There is also a presumption in the English Law that " all homicide is malicious and murder, until the contrary appears from circumstances of alleviation, excuse, or justification; and it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the Court and Jury, unless they arise out of the evidence produced against him." See RUSSELL on *Crimes*, Vol. I, page 657. There is no such presumption here. In *Saunder's case* as stated in ROSCOE'S *Criminal Evidence*, p. 154, the prisoner intending to poison his wife gave her a poisoned apple which she, ignorant of its nature, gave to a child who took it and died. This was held murder in the husband, although being present he endeavoured to dissuade his wife from giving it to the child. In HALE'S *Pleas of the Crown*, Vol. I, p. 436, it is not stated that the prisoner endeavoured to dissuade his wife from giving the apple to the child. On the other hand, the author says: " If *A* commands or counsels *B* to kill *C* and before the fact is done *A* repents and comes to *B* and expressly discharges him from the fact and countermands it, if after this countermand *B* does it, it is murder in *B*; but *A* is not accessory." The decision apparently

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proceeded on the English rule that the innocence of the intervening agent had the effect of holding the prisoner liable as the principal offender. In *Agnes Gore's case*,[1] the wife who mixed ratsbane in a potion sent by the apothecary to her husband which did not kill him but killed the apothecary who, to vindicate his reputation, tasted it himself, having first stirred it up, was held guilty of murder because the wife had the intention of killing the husband though not of killing the apothecary. It is possible that an Indian court may hold in such a case that it was the duty of the wife to warn and prevent the apothecary from tasting the potion and that she was guilty of an illegal omission in not doing so. Whether the case might not come under S. 301, Indian Penal Code, also it is unnecessary to consider. In *The Queen* v. *Latimer*[2] " the prisoner, in striking at a man, struck and wounded a woman beside him. At the trial of an indictment against the prisoner under 24 and 25 Vic., C. 100, S. 20, for unlawfully and maliciously wounding her, the Jury found that the blow ' was unlawful and malicious and did in fact wound her, but that the striking of her was purely accidental and not such a consequence of the blow as the prisoner ought to have expected.' The Court of Crown Cases Reserved held that the prisoner was guilty. The decision proceeded upon the words of the statute. S. 18 enacted that "whosoever shall unlawfully and maliciously cause any grievous bodily harm to any person with malicious intent shall be guilty of felony." Then S. 20, leaving out the intent, provided that whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person shall be guilty of misdemeanour. *Lord Coleridge*, C. J., pointed out that the language of Ss. 18 and 20 was different and that the earlier statute had been altered which provided that the intention should be against the person injured. In *Regina* v. *Michael*, [3] where a bottle containing poison was put on the mantel-piece where a little child found it and gave part of the contents to the prisoner' child who soon after died, the Judges were of opinion that " the administering of the poison by the child was under the circumstances of the case as much in point of law an administering by the prisoner as if the prisoner had actually administered it with her own hand." This decision also, no doubt, proceeded on the

1. (1614) 77 E. R. 853. 2. (1886) 17 Q. B. D. 359.

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ground of want of discretion in the intervenor, the child. The Indian courts may hold that a person who keeps poison at a place where others might have access to it must be taken to know that death is likely to result from the act. It is clear that English decisions are not always a safe guide in deciding cases in this country where the provisions of the Penal Code must be applied. In *Shankar Balkrishna* v. *King-Emperor*[1] the Calcutta High Court held that the prisoner in the case, an Assistant Railway Station Master, was not liable where death would not have resulted if the guard had not acted carelessly, as the prisoner could not be taken to know that the accident to the train which resulted in the loss of human life was likely to lead to death. In *In re The Empress* v. *Sahae Rae*,[2] which may be usefully compared with *The Queen* v. *Latimer*,[3] and where also the prisoner was held guilty, the decision was put on the ground that the prisoner knew it to be likely that the blow would fall on a person for whom he had not intended it. Holding, as I do, that, in the circumstances of this case, the prisoner could not be said to have known that it was likely that the prosecution 1st witness would throw aside the *halva* so as to be picked up and eaten by some one else and that the prisoner was not responsible, in the circumstances, for the voluntary act of prosecution 1st witness, I must come to the conclusion that the prisoner is not guilty of the murder of the girl Rajalakshmi. It is not contended that there was a legal duty on the part of the accused to prevent the girl from eating the *halva* and that he was guilty of murder by an illegal omission.

I would uphold the finding of acquittal of the lower court and dismiss the appeal.

Benson J.:—As we differ in our opinion as to the guilt of the accused, the case will be laid before another Judge of this court, with our opinions under S. 429, Criminal Procedure Code.

This appeal coming on for hearing under the provisions of S. 429 of the Code Criminal Procedure

The Court delivered the following

JUDGMENT:—*Rahim* J.:—The question for decision is whether the accused Suryanarayanamurti is guilty of an offence

1. (1904) I. L. R. 32 Cal. 73. 2. (1877) I. L. R. 3 Cal. 623.

3. (1886) 17 Q. B. D. 359.

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under S. 302, Indian Penal Code, in the following circumstances. He wanted to kill one Appala Narasimhulu on whose life he had effected rather large insurances and for that purpose gave him some *halva* (a sort of sweet meat), in which he had mixed arsenic and mercury in a soluble form, to eat. This was at the house of the accused's brother in-law, where Appala Narasimhulu had called by appointment. The man ate a portion of the *halva*, but not liking its taste threw away the remainder on the spot. Then, according to the view of the evidence accepted by my learned brothers *Benson* and *Sundara Aiyar* JJ., as well as by the Sessions Judge, a girl of 8 or 9 years named Rajalakshmi, the daughter of the accused's brother-in-law, picked up the poisoned *halva*, ate a portion of it herself, and gave some to another child of the house. Both the children died of the effects of the poison, but Appala Narasimhulu, the intended victim, survived though after considerable suffering. It is also found as a fact, and I agree with the finding, that Rajalakshmi and the other girl ate the *halva* without the knowledge of the accused, who did not intend to cause their deaths. Upon these facts *Benson* J. would find the accused guilty of the murder of Rajalakshmi, while *Sundara Aiyar* J., agreeing with the Sessions Judge, holds a contrary view.

The question depends upon the provisions of the Indian Penal Code on the subject as contained in S. 299 to 301. The first point for enquiry is whether the definition of culpable homicide as given in S. 299 requires that the accused's intention to cause death or his knowledge that death is likely to be caused by his act in question must be found to exist with reference to the particular person whose death has actually been caused by such act, or is it sufficient for the purposes of the section if criminal intention or knowledge on the part of the accused existed with reference to any human being, though the death of the person who actually fell a victim to the accused's act was never compassed by him. I find nothing in the words of the section which would justify the limited construction. S. 299 says: "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." The language is perfectly general; all

that it requires is that there should be an intention to cause death or a knowledge that death is likely to be the result, and there is nothing in reason which, in my opinion, would warrant us in saying that the homicidal intention or knowledge must be with reference to the life of the person whose death is actually caused. The law affords protection equally to the lives of all persons, and once the criminal intention, that is, an intention to destroy human life, is found, I do not see why it should make any difference whether the act done with such intention causes the death of the person aimed at or of some one else. Illustration (*a*) to S. 299 makes it quite clear that the legislature deliberately employed general and unqualified language in order to cover cases where the person whose death is caused by the act of the accused was not the person intended to be killed by him but some other person. S. 301 also supports this construction as it assumes that the accused in such cases would be guilty of culpable homicide; and I may here point out that the object of this section is to lay down that the nature of culpable homicide of which the accused in these cases would be guilty, namely whether murder or not, would be the same as he would have been guilty of, if the person whose death was intended to be brought about had been killed. Now the first paragraph of S. 300 declares that culpable homicide shall be deemed to be murder if the act by which death is caused is done with the intention of causing death, using so far the very words of S. 299. In the 2nd and 3rd paragraphs of S. 300 the language is not quite identical with that of the corresponding provisions in S. 299, and questions may possibly arise whether where the fatal act was done not with the intention of causing death but with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that the accused is likely by such act to cause death, the offence would be one of murder or culpable homicide not amounting to murder. But it is not necessary for me to express any opinion on these matters as in the present case the prisoner undoubtedly intended to cause death.

The next point for consideration is whether the death of Rajalakshmi was caused by the accused's act within the meaning of S. 299. The question is really one of fact or of proper inference to be drawn from the facts. That girl's death was caused by eating the sweetmeat in which the accused had mixed poison

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and which he brought to the house where the girl lived in order to give it to the man for whom it was intended. It was given to him, but he, not relishing the taste of it, threw it down. The deceased girl soon afterwards picked it up and ate it. But the accused was not present when Rajalakshmi ate it, and we may even take it that, if the accused had been present, he would have prevented the girl from eating the sweetmeat. These being the facts, there can be, however, no doubt, that the act of the accused in mixing arsenic in the *halva* and giving it to Appala Narasimhalu in Rajalakshmi's house was one cause in the chain of causes which brought about the girl's death. The question then is whether this act of the accused was such a cause of Rajalakshmi's death as to justify us in imputing it to such act. In my opinion it was. Obviously it is not possible to lay down any general test as to what should be regarded in criminal law as the responsible cause of a certain result when that result, as it often happens, is due to a series of causes. We have to consider in each case the relative value and efficiency of the different causes in producing the effect and then to say whether responsibility should be assigned to a particular act or not as the proximate and efficient cause. But it may be observed that it cannot be a sufficient criterion in this connection whether the effect could have been produced in the case in question without a particular cause, for it is involved in the very idea of a cause that the result could not have been produced without it. Nor would it be correct to lay down generally that the intervention of the act of a voluntary agent must necessarily absolve the person between whose act and the result it intervenes. For instance, if *A* mixes poison in the food of *B* with the intention of killing *B* and *B* eats the food and is killed thereby, *A* would be guilty of murder even though the eating of the poisoned food which was the voluntary act of *B* intervened between the act of *A* and *B*'s death. So here the throwing aside of the sweetmeat by Appala Narasimhulu and the picking and the eating of it by Rajalakshmi cannot absolve the accused from responsibility for his act. No doubt the intervening acts or events may sometimes be such as to deprive the earlier act of the character of an efficient cause. Now, suppose, in this case Appala Narasimhulu had discovered that the sweetmeat was poisoned and then gave it to Rajalakshmi to eat, it is

to his act that Rajalakshmi's death would be imputed and not to the accused's. Or suppose Appala Narasimhulu, either suspecting that the sweetmeat was poisoned or merely thinking that it was not fit to be eaten, threw it away in some unfrequented place so as to put it out of harm's way and Rajalakshmi happening afterwards to pass that way, picked it up, and ate it and was killed, the act of the accused in mixing the poison in the sweetmeat could in that case hardly be said to have caused her death within the meaning of S. 299. On the other hand, suppose Appala Narasimhulu, finding Rajalakshmi standing near him and without suspecting that there was anything wrong with the sweetmeat, gives a portion of it to her and she ate it and was killed, could it be said that the accused who had given the poisoned sweetmeat to Appala Narsimhulu was not responsible for the death of Rajalakshmi? I think not. And there is really no difference between such a case and the present case. The ruling reported in 13 W. R. Cr. Letters, p. 2, also supports the view of the law which I have tried to express.

Reference has been made to the English law on the point and though the case must be decided solely upon the provisions of the Indian Penal Code, I may observe that there can be no doubt that under the English Law as well the accused would be guilty of murder. In English Law it is sufficient to show that the act by which death was caused was done with malice aforethought, and it is not necessary that malice should be towards the person whose death has been actually caused. This is well illustrated in the well-known case of *Agnes Gore*[1] and in *Saunder's case*[2] and also in *Regina* v. *Michael*[3]. No doubt "malice aforethought," at least according to the old interpretation of it as including an intention to commit any felony, covers a wider ground in the English Law. than the criminal intention or knowledge required by Ss. 299 and 300, Indian Penal Code, but the law in India on the point in question in this case is undoubtedly, in my opinion, the same as in England.

Agreeing therefore with *Benson* J., I set aside the order of the Sessions Judge acquitting the accused of the charge of murder and convict him of an offence under S. 302, Indian Penal Code.

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1. (1614) 77 E. R. 853.
2. 1. Hale P. C. 431.
3. 9 C. and P. 356.

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I also agree with him that, in the circumstances of the case, it is not necessary to impose upon the accused the extreme penalty of the law, and I sentence the accused under S. 302, Indian Penal Code, to transportation for life.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Sankaran Nair.

Ganapathi Pillai (died) and others .. Appellants* (*Defendants*)

v.

Sundara Thevan .. Respondent (*Plaintiff*)

Ganapathi Pillai v. Sundara Thevan.

Contract Act, S 74—Exorbitant compound interest a penalty—300 p.c.

Exorbitant interest at 300 p. c. compound interest in default of payment on due date is a stipulation by way of penalty.

Second appeal from the decree of the Subordinate Judge's Court of Tuticorin in A. S. No. 63 of 1905 presentɛd against the decree of the Court of the Distiict Munsif of Srivilliputhur in O. S. No. 336 of 19^4.

M. A. Tirunarayanachari for appellants.

V. C. Seshachari for respondent.

The Court delivered the following

JUDGMENT :—We think that on the facts which are not in dispute the stipulation for interest at 300 per cent. compound interest in default of payment on due date is a stipulation by way of penalty.

The extraordinarily high rate at which the interest is fixed, as well as the fact that the plaintiff has not ventured to sue for the whole amount due to him according to the terms of the document, are circumstances indicating that it could not have been in the contemplation of the parties to enforce the condition otherwise than as a penalty in the event of a breach.

The plaintiff is therefore entitled to recover reasonable compensation and the Subordinate Judge must return a finding as to what amount is due on that footing. Further evidence may be taken.

The finding should be submitted within six weeks, and seven days will be allowed for filing objections.

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* S. A. No. 38 of 1906. 1st October, 1909.

Ganapathi Pillai v. Sundara Thevan.

In compliance with the above order the Subordinate Judge submitted the following

FINDING:—In the light of the rulings reported in *Chuhar Mal* v. *Mir* [1]; *Khurram Singh* v. *Bhawani Baksh*[2] and (1902) I. L. R. 26 M. 111 and in the light of the High Court's opinion in this very case that the plaintiff's claim is, in its nature, an attempt to enforce a penalty, I consider that in the circumstances of the case nothing more would be required as reasonable compensation than an addition of a sufficiently large percentage of interest in order to meet the ends of justice. I hold that anything more would be offering a premium for such chit funds, which are fruitful of more harm than good to the public at large and that interest at 24 per cent. per annum allowed by the court of first instance, was a sufficient and reasonable compensation.

The Court delivered the following

JUDGMENT:—We accept the finding and reverse the decree of the Subordinate Judge and restore that of the District Munsif.

Each party will bear his own costs in this and the lower appellate court. Time for redemption will be two months from this date.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Miller.

Rama Naicker .. Appellant* (Accused).

In re Rama Naicker.

Cr. P. C., Ss. 304, 305 — *"Accident or mistake" —Jury, questioning of.*

A Judge has no power to question a Jury as to the reasons of their verdict where the same is unanimous and unambiguous.

Where a Judge questioned a Jury as to their reasons for their verdict which was unanimous and unambiguous and in consequence two of the Jury were led to say they were misled as to some evidence by the notes of the foreman and that they would like to reconsider the case: *Held* that the case was not a case of "accident or mistake" within the meaning of S. 304, Cr. P. C.

Appeal from the order of the Court of Session of the Trichinopoly Division in Case No. 57 of the Calendar for 1911.

D. Devadoss for the Public Prosecutor.

The accused was not represented.

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* Cr. A. No. 568 of 1911. 22nd January 1912.

1. (1879) I. L. R. 2 A. 715.
2. (1881) I. L. R. 3 A. 446.

In re Rama Naicker.

The Court delivered the following

JUDGMENT :—There is no provision of the Code of Criminal Procedure which empowers a Judge to question the jury as to their reasons for an unanimous verdict when there is nothing ambiguous in the verdict itself and no uncertainty in the minds of the jury themselves regarding it. S. 303 limits the power of the Judge to the asking of such questions as may be necessary to ascertain what their verdict is. The view of the scope of S. 303 is clear from its language, and is in accordance with the decision in *Emperor* v. *Kondiba*[1]. In the present case there was no doubt as to what the verdict of the jury was, *viz.*, a unanimous verdict of not guilty. The Judge had no power to question them as to their reasons for this verdict. It was this questioning and the conversation which then followed which led two of the Jury to say they had been misled as to some of the evidence by the notes of the foreman and that they would like to reconsider the case with the result that the jury unanimously brought in a verdict exactly the opposite to that previously given. We do not think that this is a case in which it can be said that a wrong verdict was delivered "by accident or mistake" within the meaning of S. 304, Cr. P. C. To hold that the section could be invoked to legalise the procedure followed by the Sessions Judge in this case would render ineffective the limitation imposed by the legislature in S. 303 on the Judge's power to interrogate the jury. We must, therefore, set aside all proceedings taken on the delivery of the jury's first verdict, and direct the Sessions Judge to retry the case from that point in accordance with law. It will be open to him either to accept that verdict or to refer the case under S. 307, Cr. P. C., if he considers the latter course necessary for the ends of justice.

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1. (1904) I. L. R. 28 Bom. 412.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Sundara Aiyar.

Narayanasami Naiker and others .. Petitioners *
(*Accused*).

In re **Narayanasami Naicker.**

Cr. P. C., Ss. 107 *Cl.* (4,) 496—*Bail—Discretion to refuse bail to person proceeded with under S.* 107, *Cr. P. C.*

A Magistrate is not bound as a matter of law to allow bail to a person brought before him for proceedings under S. 107, Cr. P. C. S. 496, Cr. P. C. must be taken subject to the special provisions of Cl. (47) of S. 107. Ss. 167 Cl. (2), 334, 337 and S. 107, Cl. (4), Cr. P. C., compared.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to release the petitioners in the case No. 2 of 1912 on the file of the joint-Magistrate of Pollachi (Cr. P. No. 1 of 1912 on the file of the Sessions Court of Coimbatore).

T. Rangachari for petitioners.

M. D. Devadoss for the Public Prosecutor.

The Court made the following

ORDER :—This is an application for bail The petitioners were arrested by the Police under S. 151, Cr. P. C., on the ground that the police apprehended that they were about to commit house-breaking and theft. The petitioners were produced before the Sub-Magistrate of Udumulpet. He was of opinion that proceedings should be instituted against the petitioners under S. 10 of the Criminal Procedure Code, to take security from them for keeping the peace and sent them up to the Joint-Magistrate of Pollachi. The Joint-Magistrate before whom proceedings under S. 107 were pending, considered it necessary to detain them in custody pending the proceedings, and he rejected their application to release them on bail. The Sessions Court of Coimbatore also dismissed an application made to it for bail. It is contended, before us, that the Joint-Magistrate was bound to release the petitioners on bail and that he had no discretion to refuse to do so. It is also urged that he if he had such discretion, the circumstances of the case did not justify his

* Cr. M. P. No. 11 of 1912. 17th January, 1912.

In re Narayanasami Naicker.

refusal of bail. The Joint-Magistrate has given very good reasons for his opinion that it was necessary to detain the petitioner in custody until the completion of the enquiry under S. 107 and the Sessions Judge has concurred in that opinion. We are unable to say that the discretion has been exercised wrongly, if the Magistrate was not bound to discharge the petitioners on bail. The question, therefore, for our decision is whether he was bound to do so. Mr. Rangachariar, for the petitioners, relies on S. 496 of the Criminal Procedure Code which, according to him, entitles any person (other than a person accused of a non-bailable offence) who appears or is brought up before a court to be released on bail. We agree that the petitioner would be entitled to bail under this section, if there were no other sections disentitling him to it, but S. 107, Cl. (4) provides that a Magistrate before whom a person is sent under that section "may in his discretion detain such person in custody until the completion of the enquiry hereinafter prescribed." The petitioner in this case was admittedly a person sent under the section to the Joint-Magistrate. The clause expressly gives power to the Magistrate to detain the person in custody until the completion of the enquiry. The contention on behalf of the petitioner is that this provision must be taken to be qualified by S. 496. It is argued for the Crown, on the other hand, that the general provision in S. 496 must be taken to be subject to the special provisions contained in Cl. (4) of S. 107. Mr. Rangachariar contends that the rule laid down in S. 496 is intended to give an absolute right of bail in all cases where an accused person is in custody, whether under an order of court or otherwise, but this contention appears to us to be untenable. S. 344 lays down that in cases where it becomes necessary or advisable to postpone the commencement of or adjourn any enquiry or trial, the court may, by a warrant, remand the accused, if in custody. The explanation to the section provides that, if sufficient evidence has been obtained to raise a suspicion that the accused may have committed the offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand. It will be observed that the explanation refers to cases where further evidence may be obtained by a remand, the object of the remand being to obtain further evidence. It cannot be held that an accused person is entitled to bail where he is

remanded under this provision, for to allow bail in such a case would frustrate the very object for which the remand is ordered by the court. A similar observation would apparently apply where an order for remand is made under Cl. (2) of S. 167. It cannot, therefore, be held that S. 496 gives an absolute right to bail to any person who appears or is brought up before a court and is not charged with a non-bailable offence, but it must be read along with any other provision giving a special right of detention to a court, and Cl. (4) of S. 107 gives such special power. That provision may be compared with S. 337, Cl. (3), which gives a Magistrate tendering a pardon to an approver the power to detain him in custody until the termination of the trial by the Court of Sessions or High Court. The power is qualified by restricting it to cases where an approver is not on bail; but no such qualification is made in S. 107. It is no doubt true that a person charged with a non-bailable offence is, except in cases falling within Ss. 334 and 167, entitled to bail, but the same considerations are not necessarily applicable to the two cases. The object of detaining in custody a person charged with an offence is generally to secure his appearance for being dealt with according to law on the charge made against him, and the taking of bail would secure that object; but in cases of proceedings under S. 107, taken for the purpose of preventing a person from committing a breach of the peace, the legislature may have regarded it as necessary to take steps to prevent him from doing so before the Magistrate decides whether it is necessary to take security from him. This object would not be secured by merely securing his appearance at the enquiry to be made under the section. There may be cases where a person charged under S. 107 may appear to be so dangerous a character, that it would be desirable to detain him in custody until the enquiry against him is completed. Mr. Rangachariar points out that no provision for such detention is made, where a person charged under S. 107 is not sent up to the enquiring Magistrate by another Magistrate, but the enquiring Magistrate himself orders the arrest of the person charged. It is no doubt true that S. 114 only empowers the Magistrate to order the arrest of the person concerned, and does not provide that he may detain him in custody until the completion of the enquiry; but assuming that a person so arrested is entitled to be released on

In re Narayanasami Naicker.

bail under S. 496, we do not think that this anomaly is sufficient to justify us in not giving effect to the clear words of S. 107, Cl. (4), which entitle the Magistrate to detain the person concerned in custody in cases to which that clause is applicable. The question is not covered by any previous decision. It was left expressly undecided in *Chidambaram Pillai* v. *The Emperor.*[1] In *Merwa Lal Thakur* v. *The Emperor*[2] all that was held was that bail cannot be demanded from a person against whom proceedings under S. 107 are contemplated but no proceedings have been drawn up or issued. In *Raghunandan Pershad* v. *The Emperor*[3] the Calcutta High Court held that, except in the special circumstances referred to in Cls. (3) and (4) of S. 107, and which were admittedly not applicable to that case, the law did not empower a Magistrate to detain a person in custody until the completion of the enquiry, and that the Magistrate was bound to grant bail. On the whole, we are of opinion that in this case the Joint-Magistrate had the right to refuse to enlarge the petitioner on bail and we, therefore, dismiss this petition.

IN THE JUDICAL COMMITTE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, UPPER BURMA.]

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Mi Me and others .. Appellants*

v.

Mi Shawe Ma .. Respondent.

Mi Me *v.* Mi Shawe Ma.

Burmese Law—Marriage—No ceremony necessary—Proof of mutual consent alone necessary—Proof of consent—Polygamy—Marriage with wife's sister.

In Burma polygamy is undoubtedly lawful, and it is not unlawful to marry the sister of a living wife, though such a marriage is not considered quite respectable, while marriage with a deceased wife's sister is looked upon as proper and even laudable.

The law relating to marriage in Burma is extremely lax. No ceremony of any kind is essential. Mutual consent is all that is required.

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1. (1908) I.L.R. 31 M. 315. 2. (1906) 11 C.W.N. 415.
3. (1904) I.L.R. 32 C. 80.

In the absence of direct proof, consent may be inferred from conduct of the parties or established by reputation, but when proof of marriage depends wholly or mainly on reputation, the circumstances of the case must be scrutinized with some caution.

Mi Me v. Mi Shawe Ma.

Appeal from a judgment and decree of the Court of the Judicial Commissioner, Upper Burma, dated the 11th October 1909, which reversed a judgment and decree of the District Court, Magwe, dated the 9th February 1909.

The Judgment of their Lordships was delivered by

Lord Macnaghten:—This is an appeal from a judgment of the Judicial Commssioner of Upper Burma reversing a decree of the District Court of Magwe.

The question on which the courts differed relates to the status of the plaintiff Mi Shwe Ma. She claims to have been lawfully married to one Maung Aung Myat, deceased, and, as his widow, to be entitled to share equally in his estate with her elder sister Mi Me, who had been married to him for many years before his connection with the younger sister.

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The law relating to marriage in Burma is extremely lax. No ceremony of any kind is essential. Mutual consent is all that is required.

In the absence of direct proof consent may be inferred from the conduct of the parties or established by reputation. But when proof of marriage depends wholly or mainly on reputation the circumstances of the case must be scrutinised with some caution because the same word which is used to describe a woman lawfully married is applied by the Burmese to a woman living with a man on less honourable terms. The lax notions prevalent among the lower classes on the subject seem to be generally deplored and condemned by their betters, and it may be that the difference of opinion between the two courts is due in some measure to the fact that the District Judge was a native gentleman, an educated Burman, who naturally regarded with little

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favour if not with positive repugnance practices tolerated by the law of his country but not in accordance with the standard of a higher civilisation. On the other hand, the Judicial Comissioner was an Englishman of great experience, without any prejudice in favour of Western notions, whose only object seems to have been to administer the law truly and indifferently as he found it laid down in the Dhammathats and the rulings of his predecessors, and in Sir John Jardine's "Notes on Buddhist Law" which seems to be the principal authority on the subject.

Both the learned Judges analyse the evidence with great care, though they regard it from different standpoints. The District Judge puts aside the testimony of some witnesses as unworthy of belief while the Judicial Commsssioner thinks there was no reason for discrediting them. Whether that particular testimony is accepted or not there is very little contradiction in the evidence. There is abundance of evidence to the effect that Mi Shwe Ma was recognised as the wife of Maung Aung. Myat. Mi Me herself says: "Plaintiff was known notoriously as Maung "Aung Myat's wife." No one says that she occupied a dishonourable or an inferior position. Maung Aung Myat was a Twinzayo, that is an hereditary oil well owner, and as such entitled to receive every year a certain number of oil well sites in the oil-bearing district of Yenangyaung in Upper Burma. Twinzayo after Twinzayo comes forward on both sides to say that Twinzayos generally have two wives, and that Mi Shwe Ma was Maung Aung Myat's wife. Some of the witnesses may have used the word translated "wife" in a loose sense, but at least one witness on each side says that Maung Aung Myat and Mi Shwe Ma were "husband and wife," an expression which seems to convey the meaning that she was his wedded wife. Then it may be observed that one of the witnesses, who says that Mi Shwe Ma was Maung Aung Myat's wife, was not a Burman but a Mahommedan of some position, being the head clerk in the Burma Oil Company.

The points on which most reliance was placed on behalf of the appellant seem capable of explanation. One point was that there was no entertainment given on Mi Shwe Ma's alleged marriage. When there is a marriage between persons who have

not been married before, it seems to be usual to give an entertainment at which "pickled tea" is the principal feature, or at least the chief delicacy. There was no pickled tea at Mi Shwe Ma's wedding. But then it seems that, in the case of persons who have been married before, it is not usual to have these entertainments. Maung Aung Myat had five or six children grown up living with him, and Mi Shwe Ma was a widow with two children living. Then something was made of the fact that Mi Shwe Ma continued to live with her mother in her own house. But there is authority for saying that such an arrangement is a mere matter of convenience and probably necessary for the sake of peace and quietness, when each wife has a family of her own. Great stress was laid on the fact that it was not clearly proved that Maung Aung Myat and Mi Shwe Ma messed together, or used to "eat out of the same pot." Eating out "of the same pot" seems rather to be an outward and visible sign of social equality than a proof of matrimony. A man united to a woman of lower degree raises her to his own social position by "eating out of the same pot." Here there is evidence that Maung Aung Myat took his meals with Mi Shwe Ma and her family when he visited her. It is difficult to see how there can be any question of social inferiority in the present case. Mi Me was Mi Shwe Ma's sister and on perfectly good terms with her and the mother during Maung Aung Myat's life. As to Maung Aung Myat's business, he seems to have managed it himself. Sometimes one sister and sometimes the other, sometimes both, were seen with him when he visited his oil wells, but apparently he kept the business in his own hands.

On the whole their Lordships are of opinion that the appellants have not made out a sufficient case for disturbing the judgment of the Judicial Commissioner and their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for the appellants: *Messrs. Sanderson, Adkin, Lee and Eddis.*

Solicitors for the respondent: *Messrs. T. L. Wilson and Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer.

Narayana Kutti Goundan .. .. Appellant* (*1st Plaintff*)

v.

Pechiammal *alias* Mahali Ammal &c. .. Respondent (*Defts. Nos.* 1 & *and 2nd Plff.*).

Mortgage—Subrogation—Discharge of mortgage by stranger—Redemption—Reversioner's right to redeem—Reversioner's right to pay debt and save property from sale—Lien—Contract Act, S. 69.

Kutti Goundan v. Mahali Ammal.

Mere payment of a mortgage debt by a stranger will not entitle him to the mortgagee's right by subrogation, it not being open to any meddler to claim a lien by discharging a mortgage with which he had no concern. [*Ram Tuhul Singh* v. *Biseswar Lal Sahu*[1] referred to.]

English, American and Indian law reviewed and distinctions pointed out.

A reversioner cannot voluntarily claim to redeem a mortgage made by the last male holder or institute a suit for that purpose ; but where the property has been brought to sale by the mortgagee he has sufficient interest in the property to entitle him to discharge the debt and save the property from sale and thereby obtain a lien on the property capable of being assigned or charged.

Second appeal from the decree of the District Court of Coimbatore in A. S. No. 153 of 1909, presented against the decree of the Court of the District Munsif of Udumalpet in O. S. No. 187 of 1908.

C. Krishnamachariar for *K. Srinivasa Ayangar* for appellant relied upon *Butler* v. *Rice*[2], Fisher p. 597 (6th Edn.), *Puttanna* v. *Subbanna Shastri*[3] *Bepin Behari Shaha* v. *Manoda Dasi*[4] and C. R. P. 343 of 1908 to show the reversioner's interest in paying and the right to be reimbursed.

Respondent *not represented.*

The Court delivered the following

JUDGMENT:—*Sundara Aiyar J.*—The facts necessary for the disposal of this second appeal may be very briefly stated. One Venkatachella Mudali hypothecated certain land to one Muthu

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* S. A. No. 1095 of 1910. 29th December, 1911.

1. (1875) 2 I. A. 131
2. (1910) 2 Ch. 277.
3. (1906) I L. R. 30 M. 195.
4. (1902) 6 C. W. N. 912.

Kutti Goundan v. Mahali Ammal.

Sundara Aiyar J.

Goundan in 1898 and died in 1904 leaving behind him two widows, the 1st and 2nd defendants in this suit, and 5 daughters defendants Nos 3 to 7. Muthu Goundan obtained a decree on his mortgage bond against the widows and certain purchasers from them. The property was directed to be sold in execution of the decree and while the sale was actually going on, Narayana Kutti Goundan, one of the plaintiffs in this suit, paid the amount of the decree into court. Four of the daughters executed a mortgage bond in favour of the two plaintiffs here for the amount which the bond alleges was received from them for discharging the amount required for paying up the decree amount due to Muthu Goundan. The property mortgaged under the instrument was the same as that which had been mortgaged to Muthu Goundan. The plaintiff's suit is to recover the amount due under their mortgage bond by sale of the mortgaged property and personally from the defendants Nos. 3 to 6, the executants of the bond. The District Munsif was of opinion that the daughters as reversioners having only a *spes successionis* had no such interest in the mortgaged property as would entitle them to redeem Muthu Goundan, and that the plaintiffs' obtained no legally enforceable right under the mortgage to them as against the mortgaged property. He therefore refused to pass a decree for the sale of the land, but gave the plaintiffs a personal decree against the defendants Nos. 3 to 6. On appeal the District Judge confirmed the Munsif's decree holding that, though the defendants Nos. 3 to 6 must be held to have some interest in the land and might be entitled to a charge on the land against the 1st and 2nd defendants, the plaintiffs who lent money to the daughters could not be held to have obtained any valid right under their mortgage. The 1st plaintiff, Narayana Kutti Goundan, has appealed to this court from the decree of the District Judge.

It is clear from the facts of the case that the plaintiffs lent moneys to the four daughters on the security of such interest as they would obtain in the land by redeeming Muthu Goundan's mortgage. If the daughters obtained a valid charge on the land against the widows, the defendants Nos. 1 and 2, by redeeming the mortgage, there is no reason for holding that they could not create the mortgage in question in the plaintiffs' favour charging their right.

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The plaintiffs then would stand in the position of submortgagees with respect to the defendants Nos. 1 and 2 and would be entitled to sue both their mortgagors, the daughters, and the defendants Nos. 1 and 2 to enforce their mortgage by the sale of the 1st and 2nd defendants' rights in the land. It was not suggested in the courts below that the plaintiffs lent the money merely on the personal security of the executants of the mortgage deed. The question for decision in this second appeal therefore is whether the daughters who executed it, obtained any charge over the land by discharging the amount due to Muthu Goundan. It is contended for the appellant, first, that they would stand in the shoes of Muthu Goundan by subrogation merely by discharging his debt, and, secondly, that they were persons entitled to redeem Muthu Goundan's mortgage under S. 91 of the Transfer of Property Act and by redeeming him became entitled to his right as against the 1st and 2nd defendants The first of these two arguments was put on a broader ground than the second, it being contended that, whether a reversioner under the Hindu Law is a person entitled to redeem under S. 91 of the Transfer of Property Act or not, the right of subrogation was wider, and that, the daughters having discharged a burden on Venkatachellam's estate in the hands of the 1st and 2nd defendants, the land in their possession became liable for the amount paid by them. In support of this argument, the judgment of *Warrington* J. in *Butler* v. *Rice*, [1] was relied on. In that case, one Mrs. Rice was the owner of a house in Bristol and of property in Cardiff, which were together subject to a charge in favour of a bank to secure £ 450 and interest, and the title-deeds of both the properties were deposited with the bank. Mr. Rice asked the plaintiff Butler to lend him £ 450 for the purpose of paying off the mortgage. Mr. Butler agreed to lend the amount upon a legal mortgage for £ 300 of the Bristol house and a guarantee of £ 150 by Mr. and Mrs Rice's solicitor, who was to hold the title-deeds for him in the meantime. The money was paid and the deeds of the Bristol property which were recovered from the bank passed into the custody of the solicitor. Mrs. Rice did not know of the transaction and subsequently refused to execute a mortgage in favour of the plaintiff. Butler instituted

1. (1910) 2 Ch. 277.

an action against Mr. and Mrs. Rice and the solicitor for a declaration that he was entitled to a charge on the Bristol property for £ 450 and interest. *Warrington* J. took the question for determination to be whether in the circumstances of the case, Mrs. Rice was entitled to hold the Bristol property discharged from the debt of £450, not one penny of which, said the learned Judge, she had paid off herself, or whether the person who paid was entitled to treat the bank's charge as still on foot in his favour. The learned Judge observes: "In the first place, I find from the facts I have stated that it was not the intention of the plaintiff, nor indeed is it possible to suppose that any sensible man would have such an intention, to discharge the property from the debt. There are only two questions which have to be dealt with in order to arrive at the further conclusion that in equity the debt is still kept alive. The first is this: is it material that the owner of the property, the mortgagor, has not requested the person who paid the money to make the payment and, secondly, is the plaintiff's right affected by the further intention that, when the transaction was fully carried out, his position should be secured by a legal mortgage for £ 300 and a guarantee of £150? On the first question, it should be observed that this is not a case in which a person seeks to create a charge in his own favour. Here, there was an existing charge, and the only question is whether it had been paid off or kept alive. On such a question as that, it appears to me that the concurrence of the mortgagor is immaterial. Her position is not affected. The only alteration in her position is that instead of owing the money to *A* she will in future owe it to *B*." Again he says: "Then, does the fact that the plaintiff intended, if the transaction was carried out, to have a legal mortgage on the Manor Road property only and a guarantee for the remaining £150 prevent the application of the doctrine? Plainly not. His meaning was that he should have a further security, but that is no evidence that he intended in the meantime to give up such security as a transfer of the deeds to him would give him. The evidence which he gives, which I find to be true, as to what he said at the second interview supports this, namely, that the deeds were to be taken by the solicitor and held by him for the plaintiff. Such security as that gave would be superseded by the better security to be given afterwards." It may be noted that it was not contended that her husband had any

Kutti Goundan v. Mahali Ammal. —— Sundara Aiyar J.

right to act on behalf of Mrs. Rice or that the solicitor was entitled to enter into any agreement on her behalf. In these circumstances, it appears to me that the judgment of the learned Judge went very far and is not supported by any previous decision of the English courts. The learned Judge appears to hold that, though the plaintiff had no previous interest in the property to sustain his action in paying off a previous mortgage and claiming a charge for the amount paid by him, he was entitled to stand in the shoes of the bank whose charge he discharged. He observes that as there was an *existing charge* in favour of the bank the concurrence of the mortgagor is immaterial. The learned Judge no doubt refers to the agreement between Butler and Mr. Rice and the solicitor that the deeds were to be taken by the solicitor and held by him for Butler, but it is difficult to see that this would have any bearing on the question if Mr. Rice and the solicitor had no right to act for Mrs. Rice. The decision seems almost to go the length of holding that even a volunteer who pays off an existing mortgage would be entitled to a charge on the mortgaged property for the amount he paid. The decision is not based on any agreement between Butler and the debtor that the former should have the rights of the latter. The learned Judge says that the judgment in *Patten* v. *Bond* [1] and the decision in particular of *Romer* J. in *Chetwynd* v. *Allen* [2] are consistent with the view expressed by him, "for in the case before him, as in this, the material payment was made without the knowledge and without any communication with the person who was the real owner of the mortgaged property, and, notwithstanding that, *Romer*, J. held that the charge was still on foot." In *Patten* v. *Bond* [1] the money was lent at the request of trustees for the purpose of preserving the trust estate. In such cases, a right of subrogation is undoubtedly recognised in the English Law. In *Chetwynd* v. *Allen*, [2] the person who claimed the right of subrogation paid the money at the request of the trustee for the owner of the property, who was the trustee's wife, in order to discharge a mortgage executed on her property with her consent. He was therefore entitled to bind her interest by an agreement which he entered into for discharging that mortgage. The case is therefore not similar to *Butler* v. *Rice*. [3] On the other hand, the

1. 60 Law Times. 583. 2. (1899) 1 Ch. 353.

3. (1910) 2 Ch. 277.

decision in *In re Wrexham, Mold and Connah's Quay Railway Company* [1] appears to be against the view maintained by *Warrington* J. There, a Railway Company, which had issued debenture stocks and whose power of borrowing was exhausted, borrowed money from their bankers to pay a half-year's interest on the stocks, the bankers paying the interest warrants of the stock-holders when presented to them. Soon after this a judgment-creditor of the company presented a petition under the Railway Companies Act, 1867, and a Receiver was appointed under the petition. The Receiver had in his hands sufficient money to pay the next half year's interest due to some of the stock-holders. The bank claimed priority in respect of their advances over all interest payable in respect of the debenture stock; this claim was negatived by *Romer* J. and by the Court of Appeal. *Rigby* L. J. observes: "The claim is rested on a supposed subrogation and right to stand in the place of, and with the right to the securities and priorities of the creditors who have been paid off, and this is the only claim with which I propose to deal. I do not think that any right of subrogation to the securities or priorities of creditors paid off out of moneys borrowed in excess of borrowing powers has ever been allowed, or can be justified in principle." *Lindley*, M. R. and *Vaughan Williams* L. J. took the same view. It may be observed that the bank's rights against the company as a simple creditor apart from any question of priority was not denied as the money though borrowed by the company in excess of their powers was used for discharging claims lawfully binding on the bank.

The principle governing the right of subrogation in cases where it is claimed by a person, who without any previous interest in the property discharges a mortgage on it, is expressed in JONES on *Mortgages* thus: "Under the equitable principle of subrogation, one who pays a mortgage debt under an agreement for an assignment or for a new mortgage for his own protection or for the benefit of another, acquires a right to the security held by the other." The learned author quotes a passage from a recent Georgia case which may be cited here "It has been said that subrogation was a 'benevolent' doctrine and equity would apply it in any case in which

1. (1898) 2 Ch. 663 and (1899) 2 Ch. 440.

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justice required it; and under sanction of this elastic expression cases can be found where it was applied without the semblance of an agreement. We think the safer and better rule to be, and we therefore hold, that a subrogation will arise only in those cases where the party claiming it advanced the money to pay a debt which, in the event of default by the debtor, he would be bound to pay or where he had some interest to protect, or where he advanced the money *under an agreement express or implied, made either with the debtor or creditor*, that he would be subrogated to the rights and remedies of the creditor. The rule is stated in similar terms by SHELDON in his book on *Subrogation*. It has been said that "whenever a payment is made by a stranger to a creditor in the expectation of being substituted to the place of the creditor, he is entitled to such substitution. But the doctrine generally adopted, and that of these very cases when limited to the point actually decided, is that a conventional subrogation can result only from a direct agreement, express or implied, made with either the creditor of debtor, and it is not sufficient that a person paying the debt of another should have merely an understanding on his part that he is to be subrogated to the rights of the creditor, though if the agreement had been made, a formal assignment will not be necessary." The English cases do not carry the principle further.

In India the scope of the rule appears to me to be narrower still. A mere agreement either with the creditor holding a mortgage or with the debtor owing it cannot give a person lending money to discharge the mortgage a lien over the property—see S. 54 of the Transfer of Property Act. An agreement with the creditor or the debtor may entitle him to sue him for the execution of a mortgage-deed, or a deed of assignment of the mortgage as the case may be; but mortgages for a sum of Rs. 100 and upwards can be created only by registered instruments and a mere agreement to mortgage is insufficient to create a lien. In England and in America, it may be that the principles of equity would enable the courts to treat an agreement for a mortgage as giving the lender an equitable interest in the property agreed to be mortgaged. But equitable interests are not recognised in this country as distinct from legal interests, though many principles of law are borrowed from the principles of English Equity Jurisprudence. In this country, equitable mortgages by deposit of

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title-deeds are recognised only in a special class of cases referred to in S. 59 of the Transfer of Property Act when the mortgages are made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon. In *Gurdeo Singh* v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rashbehary Singh* [1] the rule of subrogation is stated, and it seems to be assumed that a payment made under agreement with the debtor or creditor that he should receive and hold an assignment of the debt as security would be sufficient to entitle the lender to the benefit of subrogation—see pages 631 and 632. In *Jagatdhar Narain Prasad* v. *A. M. Brown*[2] it was held that an agreement to give a mortgage would be enough to create a charge by way of subrogation, though the decision of the case itself does not seem to have required the enunciation of the principle. It appears to me that the important distinction between the English and Indian Law pointed out above was overlooked in these cases. No doubt a person having an agreement may sue for the specific performance of the agreement to execute or assign a mortgage, and in suits foi the execution of a mortgage-deed, the courts have sometimes passed not only a decree for specific performance but for sale also following on the execution of the conveyance. But this does not justify the view that the agreement itself can be treated as creating a charge. In the American Cyclopœdia of Law and Procedure, Vol-XXVII, the true principle applicable in England and America is stated by H. C. BLACK, the author of the article on *Mortgages.* He says: "An agreement by which a stranger undertakes to advance the redemption money and pay it for the mortgagor's benefit, to hold the premises as security for his reimbursement, and to release or re-convey to the mortgagor on being re-paid, is valid and enforcible; it is not within the Statute of Frauds and may be made the basis for a decree for specific performance." The principle is also recognised in *Khushal* v. *Punamchand*, [3] where the transaction took place in the town of Bombay and the lender who paid off prior mortgage could therefore claim an equitable mortgage. There are two kinds of cases which must be distinguished from the class under notice. No conveyance of courts would be required in cases where a person who, having a previous interest in the property pays off a prior mortgage or where the

1. (1907) 5 C. L. J. 611.
2. (1906) I.L.R. 33 C. 113.
3. (1897) I.L.R. 22 B. 164.

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owner of the equity of redemption paying off a mortgage claims priority over a subsequent incumbrancer. So also in cases where one claiming under a void or voidable conveyance or *bona fide* believing himself to have a title to the property discharges an encumbrance on it and claims a charge as against the owner. The principle contended for by the appellant that the mere payment of a mortgage debt by a stranger would entitle him to the mortgagee's rights by subrogation has always been negatived in India. See *Ram Tuhul Singh* v. *Biseswar Lall Sahu* [1]. It is impossible to argue that it is open to any meddler to claim a lien by discharging a mortgage with which he has no concern. I must therefore overrule the contention that the plaintiff can claim to be subrogated to the rights either of the daughters or of Muthu Goundan by the mere fact that he discharged the mortgage of the latter.

The next question for consideration is whether the daughters were entitled to redeem Muthu Goundan under S. 91 of the Transfer of Property Act and could, by doing so, claim a charge which they could transfer to the plaintiffs. S. 91 provides that any person having any interest in or charge upon the mortgaged property and any person having any interest in or charge upon the right to redeem the property may institute a suit for redemption. S. 85 lays down that all persons having an interest in the property comprised in the mortgage must be joined as parties to any suit under this chapter relating to such mortgage. The word "interest" must be taken to be used in the same sense in both the sections. Can it be held that a reversioner under the Hindu Law is a person having an interest within the meaning of these sections? I cannot hold that in a suit by the mortgagee for sale or foreclosure, such a reversioner is a necessary party. Indeed it is doubtful whether he can be held to be a proper party at all. It follows that a reversioner cannot be held to be entitled to institute a suit under S. 91. In *Ram Chandar* v. *Kallu*,[2] *Stanley*, C. J. and *Banerji*, J. held that the reversionary heirs of the deceased husband of a Hindu widow in possession of his property as such could not maintain a suit for redemption, although the holder of a mere easement and a remainder man have been held entitled to redeem in England [see SETON on

1. (1875) 2 I. A. 131.

2. (1908) I.L.R. 30 A. 497.

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Judgment and Orders, 6th Edition, p. 1935; *Pearce* v. *Morris*,[1]], I am on the whole inclined to hold that a reversioner cannot voluntarily claim to redeem a mortgage made by the last male holder or institute a suit for that purpose. But does it necessarily follow that when a suit is instituted by a mortgagee for sale, the reversioner has not got a sufficient interest in the property to entitle him to discharge the mortgage to prevent the loss of the property to which he would be entitled to succeed on the death of the widow? I do not think I am bound to hold that his rights stand on the same footing when he claims of his own accord to redeem and when he tries to save the property for the estate upon the mortgagee attempting to sell it. The right of a person interested in the payment of money which another is bound by law to pay and who therefore pays it to be re-imbursed by the other is recognised in S. 69 of the Indian Contract Act. There is no reason for holding that only those who have an interest in a mortgaged property within the meaning of Ss. 85 and 91 of the Transfer of Property Act can be held to be interested in the payment of the money due on a mortgage created by the last male owner. It has been held by the courts in India that a reversioner is entitled to resist a claim for probate of a will alleged to have been made by the last male owner by reason of his interest in the estate. See *Brindaban Chandra Shaha* v. *Sureswar Shaha Paramanick*[2]; *Puttanna* alias *Keshava Bhatta* v. *Ramakrishna Sastri.*[3] As observed by *Mookerjee* J. in the former case, " although a reversioner under the Hindu Law has no present interest in the property left by deceased, yet it is manifest that he is substantially interested in the protection or devolution of the estate. It is well settled that a reversioner can sue to restrain waste. The reversioner can, if he makes out a proper case, obtain an order for the appointment of a Receiver. He can maintain a suit for declaration that an adoption by the female heir in possession is invalid. He can also sue for declaration that an alienation by the female heir in possession will not be operative beyond her life-time. This has now been placed beyond the possibility of dispute by the provisions of S. 42 of the Specific Relief Act, illustrations

1. (1870) L. R. 5 Ch. 227.
2. (1909) 10 C.L.J. 263.
3. (1906) I.L.R. 30 M. 195.

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(*e*) and (*f*) to which section show that such declaratory suits may be maintained. Besides it is manifest that such a declaratory suit is maintainable by a remote reversioner, who would take an absolute interest in the absence of the immediate reversionary heir who has only qualified rights in the estate; and also, when the nearest reversioner has precluded himself from maintaining a declaratory action by his conduct or by omission to sue within the statutory period, a remote reversioner is entitled to maintain the suit." In Civil Revision Petitions Nos. 343 and 344 of 1908 it has been held by this court that a reversioner paying arrears of Government revenue in order to save the estate from sale is entitled to recover the same from the widow in possession. I am of opinion that the daughters had sufficient interest in the land to entitle them to discharge Muthu Goundan's debt when the property was brought to sale and that by doing so they obtained a charge over the land which they were entitled to assign or charge in favour of the plaintiff. I must therefore hold that the plaintiff obtained a valid charge for the amount paid by him to discharge Muthu Goundan's mortgage. The widows cannot contend that they have been put to any disadvantage by the redemption of Muthu Goundan's mortgage by the daughters. The amount due to the plaintiff was disputed by the 1st defendant in her written statement. The case does not appear to have been tried on the merits. We therefore reverse the decrees of the courts below and remand the suit to the court of first instance for disposal on the merits. The costs up to date will abide the result.

Spencer, J:—I agree with my learned brother in thinking that the defendants Nos. 3 to 7 as reversioners were persons interested within the meaning of S. 69 of the Indian Contract Act in the payment of money which the widows, the defendant Nos. 1 and 2, were bound to pay to Muthu Goundan. By discharging the debt for which the property of the defendants Nos. 1 and 2 was on the point of being sold, I think that they were equitably entitled to have a charge on the property. This being so, I am further of opinion that the assignment or sub-mortgage by the defendants Nos. 3 to 7 to the plaintiff of their lien by the deed of July 3rd, 1909, was in law a valid transaction. The result will be as above stated.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Kommeneni Chinna Veerayya (died) .. Appellant*
v. (*Plaintiff*)

Kommeneni Lakshminarasimma and others .. (Respondents) (*Defendants*).

Chinna Veerayya *v.* Lakshminarasimma

C. P. C., O. XXII. r. 1—*Abatement of suit—Hindu Law—Reversioner's suit to set aside alienation by widow.*

A reversioner's suit for a declaration that an alienation by a widow is invalid abates on the plaintiff's death and it cannot be continued by the next reversioners.

Second appeal from the decree of the Temporary Subordinate Judge's Court of Guntur in A. S. in 154 of 1906 presented against the decree of the Court of the District Munsi of Guntur in O. S. No. 54 of 1905.

Application to bring on record the petitioners as legal representatives of the deceased appellant.

The suit was brought by a reversioner to set aside an alienation. He died pending the appeal in the High Court. The next reversioners sought to be made parties. The question was whether cause of action survived.

Nagabhushanam for appellant.

L. A. Govindaraghava Aiyar for respondent.

P. Nagabhushanam submitted that the cause of action did survive and relied upon *Muthusami Mudaliar* v. *Masilamani*[1].

L. A. Govindaraghava Aiyar relied upon *Chiruvolu Punnammal* v. *Chiruvolu Perrazu*[2] and *Vishalakshi Ammal* v. *Sivaramien*[3] which the former expressly distinguishes and does not overrule the dicta of the Privy Council referred to in the the F. B. judgment.

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* S. A. No. 1519 of 1910 and C. M. P. No. 2053 of 1911. 16th January 1912.

1. (1909) I. L. R. 33 M. 342.
2. (1906) I.L.R. 29 M. 390 (F.B.)
3. (1904) I. L. R. 27 M. 577.

Chinna Veerayya v. Lakshminarasimma.

The Court delivered the following

JUDGMENT:—The prayer in the plaint according to its terms is for a declaration that the 3rd defendant is not the *illatom* son of the 1st defendant's father-in-law as well as for a declaration that the 1st defendant's deed of relinquishment in favour of the 3rd defendant cannot affect the plaintiff's rights as reversioner. The 3rd defendant raised various legal objections to the maintainability of the suit for a declaration that the 3rd defendant was not the illatom son of the 1st defendant's father-in-law. To overcome these objections the plaintiff contended that his suit was really only one to declare the deed of relinquishment invalid as against his reversionary rights. This contention was upheld and the suit was allowed to go on as one relating merely to the validity of the relinquishment. We cannot therefore now regard it as one relating to the 3rd defendant's rights as an illatom son. This court decided that in a suit by a reversioner for a declaration that a deed of alienation or other instrument executed by a widow will not affect his reversionary rights abates on the death of the plaintiff and the cause of action does not survive to the next reversioner in *Sakyahani Ingle Rao Sahib* v. *Bhavani Boyi Sahib*[1]. In *Muthusawmi Mudaliar* v. *Masilamani*[2] the cause of action was held to survive but that was on the ground that the plaintiff in the suit asked for a declaration on behalf of himself and other reversioners We are bound by *Sakyahini Ingle Rao Sahib* v. *Bhavani Boyi Sahib*[1] which was not overruled by *Chiruvolu Punnamma* v. *Chiruvolu Perraza*[3]. The Privy Council has held in *Mahamed Umar Khan* v. *Mahamed Niaz ud-din Khan*[4] that Article 118 of the Limitation Act is not applicable to suits for possession, (see the Judgment of the Privy Council dated 14th December 1911 which refers to and explains *Thakur Tirbhuvan Bahadur Singh* v. *Raja Rameswar Baksh Singh*[5]). The rights of the present petitioners who wish to prosecute the 2nd appeal as legal representatives of the original plaintiff, to recover the property on the death of the 1st defendant will not therefore be affected by their not being admitted as plaintiff's representatives

1. (1904) I.L.R. 27 M. 588. 2. (1609) I.L.R. 33 M. 342.
3. (1906) I.L.R. 29 M. 390. 4. (1911) 22 M. L. J. 240.
5. (1906) 33 I.A. 156; I. L. R. 28 A. 727.

and we must reject their application to be permitted to continue the appeal. The order of the Admission Court passed on 26th October 1911 on the application is set aside.

Chinna Veerayya v. Lakshminarasimma.

The second appeal abates. We make no order as to the costs of the Civil Miscellaneous Petition. The respondents will be entitled to their costs of the second appeal out of the estate of the deceased plaintiff.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar.

Seshagiri Row .. Appellant* (*Defendant*)

v.

Vajra Velayudan Pillai .. Respondent (*Plaintiff*).

Limitation Act, S. 14—Plaint ordered to be re-presented in proper court—Computation of period

Seshagiri Row v. Velayudan Pillai.

Proceedings instituted wrongly in a court without jurisdiction cannot be deemed legally valid and capable of being continued in another court; and where the plaint instituted in a wrong court is re-presented in the proper court, the proceedings in the right court are not to be deemed as the continuation of the proceedings in the wrong court for purposes of limitation. [*Mohidin Rowthen* v. *Nallaperumal Pillai*] followed.[1]

Second appeal from the decree of the Temporary Subordinate Judge's Court of Coimbatore in A. S. No. 47 of 1909 (on the file of the District Court, Coimbatore) presented against the decree of the Court of the District Munsif of Coimbatore in O. S. No. 958 of 1907.

T. M. Krishnaswami Aiyar for appellant.

V. Visvanatha Aiyar for respondent.

The Court delivered the following

JUDGMENT.—The facts of this case are quite similar to those in *Mohidin Rowthen* v. *Nallaperumal Pillai*[1], and according to the decision in that case the suit is clearly barred; but it

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* S. A. 433 of 1910. 28th February 1912.

1. (1911) 21 M. L. J. 1000.

Seshagiri Row v. Velayudan Pillai.

is contended that an argument of importance was not submitted to the court in that case, which would have materially influenced the judgment. That argument is that when a plaint returned for presentation to the proper court on the ground of absence of jurisdiction in the court to which it was originally presented is re-presented to the proper court, the suit itself must be regarded as a continuation of the infructuous suit in the wrong court. This argument cannot be upheld. Proceedings instituted without jurisdiction cannot be deemed as legally valid and capable of being continued in another court. In the case in *Takhuroodeen Mahomed Eshan Chowdry* v. *Kurim Bux Chowdry and others*[1] cited for the appellant, the suit was regarded as transferred from one court to another. In such a case of course it is the same suit that is continued in the court to which the transfer is made. The case in *Khellat Chunder Ghose* v. *Nusseebunnissa Bibee and others*[2] is not in point as there the question was not one of limitation, though in one portion of the judgment the learned Judges who decided the case speak of the suit being the same where a plaint returned by one court is re-presented to another court. In *Assan* v. *Pathumma*[3] this court held that the original suit must be taken to have been newly amended and the case is therefore not similar to this case. *Abboye Churn Chuckerbutty* v. *Gour Mohun Dutt and another*[4] is a decision against the respondent's contention. Section 14 of Act XV of 1877 proceeded on the basis that where a plaint was returned under S. 20 of Act XIV of 1882 and presented again to another court, the suit must be regarded as a new one and not as a continuation of the former suit. We see no reason to differ from the decision in *Mohidin Rowthen* v. *Nallaperumal Pillai*[5]. We allow the second appeal and dismiss the suit. We make no order as to costs.

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1. (1865) 3 W. R. C. R. 20.
2. (1871) 16 W. R. C. R 47.
3. (1899) I. L. R. 22 M. 494.
4. (1875) 24 W. R. C. R. 26.
5. (1911) 21 M. L. J. 1000.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

C. V. Gangadara Sastri .. Appellant*
v. (*Claimant*)
The Deputy Collector of Madras .. Respondent
(*Referring Officer*)

Gangadara Sastri v. The Deputy Collector of Madras.

Land Acquisition Act, S. 25, Cl. (1), Ss. 18, 11—"Less than the amount awarded by the Collector"—Jurisdiction of court to go into whole question of the amount of award on reference with specified objection—Jurisdiction to lessen amount of particular items subject to the proviso in Cl. (1), S. 25.

On a reference under S. 18 of the Land Acquisition Act it is competent to the Judge to hold that the claimant is entitled to a sum less than what the Collector would give him as regards some of the items included in the award, provided the total amount of compensation awarded by the Collector is not reduced.

The words "less than the amount awarded by the Collector" in Cl. (1) of S. 25 of the Act is the total amount and not what is given under differen t heads which make up the aggregate amount awarded.

When a reference is made under S. 18 the whole question as to how the compensation is to be calculated is to be necessarily re-opened and not merely the particular objection.

Appeal from the award of the Chief Judge of the Presidency Court of Small Causes, Madras, in Land Case No. 42 of 1909.

The facts appear sufficiently in the judgment.

J. L. Rosario for appellant:—The jurisdiction of the court is limited to determining the objection by the claimant (S. 20). The court cannot reduce the amount awarded by the Collector (S. 25). No right is reserved to the Crown to counterclaim. Beyond a doubt it has no right to object to the award of the Collector. The court has to consider the correctness of the allotment by the Collector with reference to the objections of the claimant. It is not open to it to support one item in the Collector's award on the ground that the Collector has allowed on another item too much. The matter becomes clear when the effect of such tinkering with the Collector's award on the question of apportionment is considered. Different parties might be interested in different items. Is the allowance on one item not to be enhanced because allowance in another item is less and the parties interested to be prejudiced? He referred also to Ss. 19,

* A. No. 14 of 1910. 22nd February 1912.

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21, 23 and 26. He cited *B. I. S. N. Company* v. *Secretary of State for India*[1]; *Abu Bekar* v. *Peary Mohun Mookerjee*.[2]

The *Advocate General* for respondent :—S. 25 prescribes that the amount awarded shall not be reduced. Subject to this, the court is to assess the value as prescribed in S. 23. The law does not contemplate the Collector stating the various items that compose the compensation amount. Even if he did, the court shall have to assess afresh if the party objects. The court is not restricted to the consideration of the objections put forward by the party. The existence of objections by the party is the condition precedent to the assessment under S. 23. Once there are the objections, the Court assesses as required by S. 23. *B. I. S. N. Company* v. *Secretary of State*[1] is wrongly decided so far as this question is concerned.

The Court delivered the following

JUDGMENTS :—*Abdur Rahim* J.—This is an appeal by one Mr. C. V. Gangadara Sastri from the award of the Chief Judge of the Presidency Small Cause Court in a land acquisition case and the only question we are asked by the appellant's vakil to consider is whether it was competent for the learned Judge to hold that on some of the items included in the award of the Collector the claimant was entitled to a sum less than what the Collector would give him though, on the whole, the total amount of compensation awarded by the Collector has not been reduced. The property acquired is a certain quantity of land and buildings standing on a portion thereof. The Deputy Collector awarded as compensation a sum of Rs. 5,404-3-5 which consisted of the following particulars :—

		Rs.	A.	P.
1.	Land at Rs. 1,000 per ground	1,700	0	0
2.	Superstructure..	2,103	0	0
3.	Trees	26	4	0
4.	Compensation for loss caused by severance of acquired land from other land of the claimant	1,000	0	0
5.	15 per cent on (1), (2) and (3)	574	7	5

1. (1910) I. L. R. 38 C. 230. 2. (1907) I. L. R. 34 C. 451.

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The appellant applied for and obtained a reference against the Collector's award under S. 18. He claimed Rs. 10,000, objecting to the finding of the Collector under each head. The Land Acquisition Judge would allow more than the Collector under heads (1) and (3) but less than what he gave under heads (4) and (5) and agreed with the Collector as to item (2). In the result, the figure arrived at by the Judge is somewhat below that of the Collector, but as he was not at liberty to award less than what the Collector has given, the Judge has confirmed the Collector's award. The contention of the appellant is that while the Judge was right in increasing the Collector's allotments under (1) and (3) it was not permissible for him to award under heads (4) and (5) less than what the Collector awarded, so that the total sum awarded by the Collector should have been increased by the sums which the Judge would give under (1) and (3) in excess of what the Collector had given. The argument is that under S. 20 the court is only to determine the objection to the award as made by the claimant and there is no provision in the Act for the filing of any cross-objection by the Secretary of State. Hence where a person interested objects to one of the items composing the award on the ground that it has been undervalued and claims something more than what the Collector has allowed under that head, all that the court is entitled to do is to allow or reject the excess claimed either *in toto* or in part but cannot reduce what has been awarded by the Collector on that account. The contention is based on a ruling reported in *British India Steam Navigation Company* v. *Secretary of State for India*,[1] where the particular question is considered. With all respect to the learned Judges (*Mookerjee* and *Sharfuddin* JJ.,) who decided that case I am unable to accept the ruling as correct. In that case, the claimant had not disputed the items in question and on that ground a distinction may perhaps be drawn between that and the present case in which the appellant disputed before the court all the items making up the award. But, having regard to the reasoning employed in the Calcutta case, I do not think that the distinction would be either substantial or satisfactory. At all events I am clear that the entire scheme of the Land Acquisition Act shows that the only limitation

1. (1910) I. L. R. 38 C. 230.

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upon the power of the court in awarding what it considers to be proper compensation is that contained in S. 25, the first sub-section of which lays down that the amount awarded to the applicant by the court shall not exceed the amount claimed by him before the Collector or be less than the amount awarded by the Collector under S. 11. What is meant by "less than the amount awarded by the Collector" is obviously the total amount and not what is given under different heads with reference to which the entire amount is arrived at. S. 11, Cl. (*ii*), requires that the Collector should make an award of the compensation which should be allowed for the land; and however the compensation may be calculated it is the sum total allowed as compensation which is one of the subjects of the award under this sub-section. The other provisions of the Act cleary confirm this inference. For instance, Ss. 18, 20 (*c*), 23 and 30 all speak of *the* amount of compensation and S. 28 of *the* sum which the Collector ought to have awarded as compensation and of *the* sum which the Collector did award as compensation. One of the points on which a claimant is entitled to ask for a reference to the court under S. 18 is the amount of compensation payable to him, that is to say, he may claim more than what the Collector has given; once that is referred the whole question as to how the compensation is calculated is necessarily re-opened so that the court may determine whether the claimant is entitled to more than what has been given to him. No doubt he is required to state in his application for reference the grounds of his objection to the award but that is required apparently to facilitate enquiry. Similarly, as to the form of the award, S. 26 requires the court to specify the amounts awarded under different clauses of S. 23 and the grounds for awarding each of the said amounts apparently for the same reasons as the Civil Procedure Code requires that the judgment of a Subordinate Court shall contain certain particulars. None of these provisions indicate, to my mind, that the objection to the award to be determined under S. 18 is not whether the total sum awarded is less than what it ought to be, but whether the valuation by the Collector of each of the items objected to is less than the proper valuation. I am therefore unable to accept the decision in *B. I. S. N. Co.* v. *Secretary of*

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State for India[1] as laying down the law correctly on the point. On the other hand, I agree with the view expressed in *Hugli Mills Co.* v. *The Secretary of State for India*,[2] that when a reference is made to court the whole case is referred subject, of course, to the limitation contained in S. 26 and not merely the particular objection. The fact that the Secretary of State cannot apply for a reference does not seem to me in any way to militate against this construction of the Act as supposed in *B. I. S. N. Co.* v. *Secretary of State for India* [1]. Probably the reason why the Secretary of State cannot question the award of the Collector by asking for a reference to court is that the Collector is regarded in this connection more or less as agent of the Secretary of State so that his award stands much on the same basis as an offer by an intending purchaser. If that be the underlying principle of Ss. 18 and 25, it stands to reason that what should be regarded to be of importance to the parties as the ultimate question for determination is whether what is offered by the Collector on the whole and not the way in which he arrived at the figures should be accepted by the claimant. Further, as I have already pointed out in this case, the appellant objected to the Collector's findings on all items, though I base my decision on the broader ground. I may also observe that none of the cases relied on by *Moorkerjee* and *Sharfuddin* JJ. in *B. I. S. N. Co.* v. *Secretary of State for India* [1] as I read them, support the propositon which they would lay down. All that those cases, *viz.*, *Abu Bakar* v. *Peary Mohan Mukerjee*, [3] *Mahammad Shafi* v. *Haran Chandra Mukerjee, Gobinda Kumar Roy Chowdhury* v. *Debendra Kumar Roy Chodhury, Prabal Chandra Mukerje* v. *Raja Peary Mohun Mukerjee*,[4] and *Promotha Nath Mitra* v *Rakhal Das Addy*[5] decide is that it is not open to a person who made no claim before the Collector to raise a question which has not been referred to the court for the first time before the judge. On the other hand, the construction I have placed upon the provisions of the Act in question agrees with what has been held by the Tribunal of Appeal in Bombay as reported in Mr. Campbell's Commentaries on the Land Acquisition Act, page 112.

1. (1910) I. L. R. 38 C. 230.
2. (1903) 12 C. L. J. 489.
3. (1907) I. L. R. 34 C. 451.
4. (1908) 12 C. W. N. 985, 98, 987.
5. (1910) 11 C. L. J. 420.

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I am therefore of opinion that the view of the law upon which the learned Chief Judge proceeded is right and the appeal must be dismissed with costs.

Sundara Aiyar J.

Sundara Aiyar J.—The question raised for decision in this case is of some importance. The Deputy Collector of Madras, acting as Collector under the Land Acquisition Act, made an award under S. 11 of the Act determining the compensation payable to one Gangadara Sastri a part of whose house was acquired by Government for the Corporation of Madras. The amount awarded by him was Rs. 5, 404-3-5 and was made up of 4 items, namely, compensation for the site, for the superstructure and for trees respectively and compensation for damages caused by the severance of the land acquired from the claimant's other land. The amount awarded by the Collector for the last item, namely, the damage caused by severance, was Rs. 1,000. The claimant had claimed before the Collector a larger amount for each of the items. The amount he claimed for the last item was Rs. 1,865. After the award, he applied to the Collector requiring that the matter be referred for the determination of the court. The learned Chief Judge of the Small Cause Court, acting as the Land Acquisition Court, passed an award determining the compensation payable under the several heads. He was of opinion that the claimant was not entitled to more than Rs. 480 for the last item, *i. e.*, the damage caused by the severance of the land acquired from the rest of the claimant's property and he accordingly reduced the amount under that head. He awarded larger amounts to the claimant for the other three items than those awarded by the Collector. But in consequence of the reduction of the fourth item the total amount due to the claimant was found by him to be Rs. 5,284-6-7 only which was less than the sum awarded by the Collector, namely, Rs. 5,404-3-5. As under S. 25 of the Act the amount awarded by the court could not be less than the amount awarded by the Collector the Judge in the result awarded to the claimant the amount of the Collector's award. The point argued in the appeal is that the learned Judge had no power to reduce the amount awarded by the Collector for the damage caused by the severance of the portion of the house from the portion not taken up. Mr. Rosario, the learned Vakil for the appellant, has elaborately examined before us the

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provisions of the Land Acquisition Act in order to make good his contention. But in my opinion he has failed to establish the correctness of his position. S. 25 (1) enacts that "when the applicant has made a claim to compensation * * * the amount awarded to him by the court shall not exceed the amount so claimed or be less than the amount awarded by the Collector under S. 11". S. 11 provides that the Collector after making the enquiries referred to in the section shall make an award under his hand of (i) the true area of the land; (ii) the compensation which in his opinion should be allowed for the land; and (iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land"; and in determining the compensation to be allowed, the Collector is to be guided by the provisions contained in Ss. 23 and 24 which lay down what matters shall and what matters shall not be taken into account in determining the amount of compensation to be awarded for the land acquired under the Act. There can be no doubt that the compensation which shoud be allowed under S. 11 (2) means the total amount of compensation awardable for the land including all the various items or considerations mentioned in S. 23 one of which is "the damage (if any) sustained by the person interested * * * by reason of severing such land from his other land." S. 25 (1), therefore, in providing that the amount awarded by the court shall not exceed the amount claimed by the applicant or be less than the amount awarded by the Collector under S. 11, must necessarily also refer to the total amount awarded by the Collector or claimed by the applicant for his land pursuant to any notice given under S. 9. It is impossible, in my opinion, to hold, by virtue of anything contained in S. 25 alone, that with regard to each item making up the total amount of compensation due for the land the court cannot exceed the amount claimed by the applicant or diminish the amount awarded by the Collector. Is there then any other provision in the Act which supports the appellant's contention that the Judge cannot diminish the amount awarded by the Collector under any one of the items making up the total amount of compensation to be awarded for the land? Strong reliance is placed by Mr. Rosario on S. 20. That section says that "the court shall thereupon cause a notice specifying the day on which

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the court will proceed to determine *the objection*, and directing their appearance before the court on that day, to be served on the following persons, namely : (*a*) the applicant ; (*b*) all persons interested in the objection except such, (if any), of them as have consented without protest to receive payment of the compensation awarded ; and (*c*) if the objection is in regard to the area of the land or to the amount of the compensation, the Collector'. Mr. Rosario's argument that the "objection" referred to in the section must be the objection raised by one of the claimants to compensation and not by the Collector or Government is, in my opinion, clearly right. The objection mentioned in the section is that already referred to in S. 18 which lays down that "any person interested who has not accepted the award may require that the matter be referred by the Collector for the determination of the court." There is no provision authorising the Collector or the Government to raise any objection to the Collector's award and to require a reference to the court. Mr. Rosario further contends that the privision "the court is to proceed to determine the objection" means in cases when the objection is to the amount of compensation any particular objection that the applicant may make to that amount, and that therefore the court has no power to adjudicate on anything except the objection to the amount raised by the applicant. In other words a reference by the Collector must be taken to be of any particular objection to the amount of compensation raised by the applicant. I am of opinion that this contention is not correct as will appear from an examination of some of the sections of the Act to be presently made. But I may observe, to begin with, that the contention of the appellant would raise a serious difficulty in the interpretation of S. 25 (1). In as much as according to that contention the Judge having power only to consider the claimant's objection that he is entitled to a larger amount than he gets under the Collector's award under any of the items making up the total amount of compensation, the total amount that the Judge would find due could not be less than the amount awarded by the Collector, the Judge having power only to increase the amount under one or other of the items making up the total. What then is the necessity for laying down in S. 25 (1) that the total amount awarded shall not be less than the amount awarded by the Collector under S. 11.? The provision would be necessary

if the Collector is at liberty to increase some of the items and to reduce others. The learned Vakil for the appellant has not been able to suggest any solution of this difficulty. The inference to be drawn from S. 25 (1) is that the restriction on the Collector's power does not refer to lessening the amount due under any individual item going to make up the amount of compensation but only to the total amount of compensation. An examination of the other relevant sections of the Act, in my opinion, confirms this view. It shows that in laying on the Collector the duty of referring the objection of the complaint S. 20 refers to the "objection" to the total compensation awarded for the land by the Collector and not to the amount settled for any of the individual items making up the total compensation. S. 20 evidently refers back to S. 18 (1). That section entitles a person who has not accepted the Collector's award to require that 'the matter' be referred by the Collector for the determination of the court "whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested." The objection is one or other of four kinds. One of them is the amount of compensation. It is not one referring to the amount awarded under any particular item making up the compensation but to the award of compensation as a whole. No right is given to a claimant to require the Collector to refer to the court his objection to the amount awarded under a particular item taking up the compensation by itself without referring the question of the total amount of the compensation. His right is to require "that 'the matter' be referred by the Collector for the determination of the court." 'The matter' is the objection to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested. This is rendered clearer by S. 20. It lays down on whom the court should direct notice to be served according as the objection is to the area of the land or the amount of compensation—see Cl. (*c*)—or to the persons to whom it is payable and its apportionment between them—see

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Cl. (*b*). It follows out the classification with reference to the applicant's objection already adopted in S. 18. The matter to be referred under S. 18 and the objection referred to therein must be the same as the objection referred to in S. 20 as the court must evidently decide the matter referred to in S. 18. Section 19 accordingly requires the Collector, in making the reference, to state for the information of the court the various matters specified in the section, namely, the situation and extent of the land, the names of the persons whom the Collector has reason to think interested in the land, the grounds on which the amount of compensation was determined, &c. Here again the objection is regarded as one to the amounts of the compensation, that is, the total amount of the compensation. In the case of such objection the Collector has to state the grounds on which the amount of compensation was determined. These grounds will no doubt state the amount which the Collector considers to be due to the claimant under each of the items mentioned in S. 23. Section 18, Cl. (2), requires *the claimant* to state the grounds on which objection to the award is taken. If the objection be to the amount of compensation he would, in stating the grounds on which he objects, naturally mention the amount he claims under each of the items making up the total amount. So far then as Ss. 18 and 20 are concerned, they show that the reference by the Collector must relate to the total amount of compensation and that the court should decide the total amount to be awarded. Ss. 23 and 24 strengthen this conclusion. S. 23 lays down that "in determining the amount of compensation to be awarded for land acquired under this Act, the court shall take into consideration—*first*, the market value of the land; *secondly*, the damage sustained by reason of the taking of any standing crops or trees; *thirdly*, the damage sustained by the claimant by reason of the severance of the land from his other land; *fourthly*, the damage sustained by the reason of the acquisition injuriously affecting the claimant's other property; *fifthly*, the reasonable expenses incidental to the claimant being compelled to change his residence or place of business; *sixthly*, the damage resulting from the diminution of the profits of the land between the time

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of the publication of the declaration under S. 6 and the time of the Collector's taking possession of the land." Evidently the section requires the court to take each of these matters into account in all cases of reference to him. This can be done only if the whole question of the amount of compensation be opened before the court and not if the jurisdiction of the court is confined to the decision of an objection relating to any one of the matters mentioned in the various clauses of S. 23. Section 26 again says that every award under part III of the Act should specify the amount awarded for the market value treated of in S. 23 (1), Cl. (*i*), and also the amounts awarded under each of the other sub-clauses of S. 23 (1). There are only two restrictions placed on the jurisdiction of the court to consider the whole question of the amount of the compensation to be paid for the land claimed by the applicant : one laid down in S. 21 that " the scope of enquiry in every such proceeding shall be restricted to a consideration of the interests of the persons affected by the objection"; and the other laid down in S. 25 that the amount awarded by the court shall not exceed the amount claimed by the applicant or be less than the amount awarded by the Collector under S. 11 and that when the applicant refuses to make a claim or has omitted without sufficient reason to make a claim before a Collector the amount awarded by the court should not exceed the amount awarded by the Collector; and that further when his omission to make a claim is held by the Judge to have been due to a sufficient cause the amount to be awarded by the court should not be less than, and may exceed, the amount awarded by the Collector. I am therefore of opinion on the interpretation of the Act that the Judge had the right, and was bound, to decide the total amount due to the claimant for the compensation and the amounts due under each of the items making up the total amount and that nothing in the Act places any restriction on his power to award a less sum under any one item than that awarded by the Collector.

I will now refer to a decision of the Calcutta High Court strongly pressed on our attention by Mr. Rosario, namely, the case of *British India Steam Navigation Company* v. *Secretary of State for India* [1]. In that case the question was raised whether

1. (1910) I.L.R. 38 C. 230.

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the Land Acquisition Judge has jurisdiction to review the award at the instance of the Collector in so far as it is not challenged by the claimants and to re-examine items not controverted by them. *Mookerjee* and *Sharfuddin* JJ. held that he could not do so. The learned Judges admit that S. 18 is "comprehensive enough to afford some basis for an argument that the whole question of the amount of compensation is referred." They say: "But this view, we think, is sufficiently negatived by S. 20 which directs the court to determine the objection, that is, the objection of the claimant. Because the claimant objects to a particular item and obtains a reference, the court cannot review another, a totally distinct and unconnected item." The argument is evidently based on the assumption that the claimant is entitled to object to a particular item only which, for reasons already stated is, in my opinion, unsound. The learned Judges put an illustration in support of their position. They say: "To take a concrete illustration, suppose the property acquired is land and a building thereon. The Collector in his award values the land at Rs. 500 a cotta and allows Rs. 1,000 for the house. The claimant obtains a reference on the ground that the land has been undervalued; is it open to the Secretary of State, who cannot obtain a reference under S. 18, to urge that the building has been overvalued, to such an extent that the objection of the claimant as to the undervaluation of the land, however well founded it may be, must fail? We are not prepared to hold that such a procedure was contemplated by the legislature." It is no doubt true that the Collector could not obtain a reference under S. 18, but that does not affect the question whether the claimant, when he requires a reference, can require that one of the items of compensation for the land in question should alone be referred and whether his right is not restricted to require the whole question of the compensation awardable for the land to be referred to the Judge. If the Judge's duty is to decide the question of the compensation payable for the land stating the amounts due under the various headings mentioned in S. 23, then the Collector has a right to adduce evidence and to prove what the amount awardable under each item is. To allow the Secretary of State to do so would not be in substance to hold, as

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apparently considered by the learned Judges, that a reference under S.18 may be made at the instance not merely of the claimant but also of the Secretary of State for India or to enable the Secretary of State to achieve by an indirect method what he cannot obtain directly. There is nothing unreasonable in holding that if a claimant chooses to require a reference the whole question of the compensation is then open before the Judge to be decided by him although the Secretary of State has in the first instance no right to require a reference. Reference is made in the judgment of the learned Judges to some previous decisions of the Calcutta High Court the principle underlying which decisions is said to support to some extent the view taken by the learned Judges. On an examination of those cases I am unable to find that they lend any substantial support to the view taken in *British India Steam Navigation Company* v. *Secretary of State* [1]. Three of them, *Gobinda Kumar Roy Chowdhury* v. *Debendra Kumar Roy Chowdhury*[2], *Mahommad Safi* v. *Haran Chandra Mukerjee*[3] and *Prabal Chandra Mookerjee* v. *Raja Peary Mohun Mukerjee*, [4] merely lay down that it is not open to the Land Acquisition Judge to go into questions raised by the parties who did not object to the award and apply for a reference. This restriction on the jurisdiction of the Judge is specially laid down in S. 21 of the Act. See also S. 20, Cl. (*b*). *Abu Bakar* v. *Peary Mohan Mookerjee*[5] is also substantially to the same effect. There a certain portion of the compensation awarded by the Collector for trees was allotted by him to the Zamindar and another portion to the under-tenants holding under the tenants of the land. The tenants objected to the allotment of the award for trees wholly to the under-tenants. On the reference coming on before the court, the Zamindar claimed the entire amount awarded as the value of the trees although he did not require a reference of the question of compensation to be made to the Judge. S. 21 would clearly bar the

1. (1910) I. L. R. 38 C. 230.
2. (1908) 12 C. W. N. 98.
3. (1908) 12 C. W. N. 985.
4. (1908) 12 C. W. N. 987.
5. (1907) I.L.R. 34 C. 451.

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Zamindar's contention. The view taken in *Hughly Mills Co.* v. *The Secretary of State for India in Council* [1] is, on the other hand, in my opinion, clearly in conflict with the decision in *British India Steam Navigation Company* v. *Secretary of State for India* [2], because it was there held that although the claimant might fail to substantiate the particular ojection raised by him to the Collector's award of compensation it was still the duty of the court to arrive at its own conclusion as to the amount of compensation to be awarded to the claimant and that it could not confirm the Collector's award without doing so. The learned Judges, *Harington* and *Brett* JJ., observe: "If then the award of the Collector has been arrived at on a wrong principle the question has been raised whether the court is bound to accept the award if the claimants fail to make out their case or whether it is not the duty of the Judge, having regard to all the evidence and to all the circumstances of the case, himself to determine what is a fair compensation for the land acquired. The learned counsel has contended that it rests with the court to determine the compensation to be awarded, and that for that purpose the Judge is in no way bound by the award but that he should consider and weigh the evidence on which it has been based in the same way as he considers and weighs the other evidence in the case and then come to his conclusion. In this contention we are of opinion that the learned counsel is right. The whole case is referred, not merely the objection, for determination, and the provisions of the Act clearly indicate that the award itself is only important in the trial of the reference in determining the question of costs." It is observed in *British India Steam Navigation Company* v. *Secretary of State for India* [2] that "an examination of the judgment, however, taken along with the points in controversy in that case makes it clear that the question now raised did not arise for consideration at all, and the isolated passage upon which reliance is placed cannot be deemed to embody a judicial determination of this point." With all deference I am unable to appreciate this observation. In *Hughli Mills Co.* v. *The Secretary of State for India in Council* [1] the Land Acquisition Judge, after finding that the claimant had failed to substantiate his ojection, proceeded to consider what conclusion he

1. (1903) 12 C.L. J. 489.

2. (1910) I. L. R. 38 C. 230.

should come to himself with respect to the proper amount of compensation to be awarded to the claimant, and the learned Judges of the High Court held that he was bound to do so and that his jurisdiction was not confined to deciding whether the claimant's objection was well founded, a view which is not in accordance with that taken in *British India Steam Navigation Company* v. *Secretary of State for India* [1]. The conclusion I have arrived at is in accordance also with the view taken by the Bombay Tribunal of Appeal, a body appointed by Statute to decide references made by the Collector under the Land Acquisition Act—see page 112 of Campbell's "Land Acquisition Act." I hold that the learned Land Acquisition Judge in this case was entitled to reduce the amount awarded by the Collector for the damage sustained by the claimant in consequence of the severance of the portion of his land taken up from the remainder of his land. This appeal must therefore be dismissed with costs.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Miller.

G. Narayanasawmi Naidu, Receiver, Nidadavolu and Melur estates .. Appellant* (*Plaintiff*)

v.

Chintalapati Subbaraju, Minor, by Mother and Guardian Bangariah.. .. Respondent (*Defendant*).

Official statements — Presumed accuracy of — Interference in second appeal.

Narayanaswami Naidu v. Chintalapati Subbaraju.

The accuracy of a statement prepared by the Revenue Department that a particular field was cultivated, on the footing of which the plaintiff had to pay revenue which the defendant was bound to pay, need not be proved by the evidence of some one present on the spot at the time the inspection of the field was made.

Second appeal from the decree of the Subordinate Judge's Court of Kistna at Ellore in A. S. No. 456 of 1909 presented against the decree of the court of the District Munsif of Narasapur in O. S. No. 88 of 1907.

K Srinivasa Aiyangar for appellant.

R. Kuppusami Aiyar for respondent.

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* S. A. No. 1719 of 1910. 5th March, 1912.

1. (1910) I.L.R. 38 C. 230.

Narayanaswami Naidu v. Chintalapati Subbaraju.

The Court delivered the following

JUDGMENT :—We think the Subordinate Judge was clearly in error in supposing that it was necessary for the plaintiff to prove the cultivation of the 90 acres by the evidence of a witness who actually saw that area under cultivation. He has also entirely misunderstood the effect which should be given to accounts prepared in the ordinary course by a public officer, as Exhibit A has been prepared in this case. There is no reason why exhibit A should not be acted upon as a correct account. It shows that the Government officer, after enquiry, found that the 90 acres were cultivated, and it is also proved that the defendant did in fact pay Rs. 450, the Government water rate on that area. The defendant gives no explanation for this having been paid if the land was not cultivated. He calls no evidence whatever to disprove the cultivation. We set aside the decree of the Subordinate Judge and restore that of the District Munsif with the modification that the decree amount is payable only out of the assets of the defendant's grandfather with costs in this and in the lower appellate court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Gorigala Venkayya and others	..	Appellants*
v.		(*Plaintiffs*)
Mugunta Lakshmiah and others	..	Respondents
		(*Defendants*).

Venkayya v. Lakshmiah.

C. P. C., O. XXI, r. 53, (6)—Scope—Attachment before judgment.

O. XXI, r. 53, C. P. C., applies to cases of attachment before judgment.

Appeal from the order of the District Court of Guntur on E. A. No. 524 in C. P. No. 6 of 1909 in O. S. No. 15 of 9105.

P. Nagabhushanam for appellant.

Respondent *not represented.*

The Court delivered the following

JUDGMENT :—The first question argued in this appeal is that an enquiry ought to have been made whether the judgment debtor had notice of the attachment or not ; but no such question was raised before the lower court. The next question

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* C. M. A. No. 60 of 1911. 25th March 1912.

that is argued is that O. xxi, r. 53, Cl. (6), does not apply to cases where the attachment was made. We do not find any sufficient reason for excluding from the operation of this rule cases of attachment before judgment. The appeal is dismissed. Venkayya v. Lakshmiah.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Sankaran Nair.

V. Venkatanarayana Pillai .. Appellant*
(*Plaintiff*)
v.
V. Subbammal and another .. Respondents
(*Defendants*).

Venkatanarayana v. Subbammal.

Hindu Law—Will—Authority to adopt given by the 1st will—Second invalid will—Effect of, on the first—Authority to adopt—Doctrine of dependent revocation.

Prima-facie a devise which is inoperative as a disposition of property is also inoperative as a revocation of an earlier disposition; but where the infirmity of the second will is apparent on the face of the will and the defect intrinsic, the second will does not operate as a revocation of the earlier devise; and where the will is inoperative for reasons outside the instrument it operates as a revocation of the earlier devise.

A Hindu stated by will that he had selected a person for adoption and further directed that in case the said adopted son happened to die in the life-time of the testator's widow she should make another adoption. Subsequently, he made the adoption of the intended person himself, and on a later date he made a second will directing that on the death of the adopted son the property should devolve in a certain manner. The second will made no mention of the first, and was found invalid on the ground that the testator had no power to dispose of the joint family property.

Held—(1) That the second will did not operate so as to revoke the authority to adopt conferred by the first on the widow.

(2) That the fact that the testator himself adopted did not put an end to the authority to adopt conferred by the first will.

(3) That the earlier will was admissible in evidence in a suit for declaration that a second adoption by the widow is invalid.

Appeal from the decree of the Hon'ble Mr. Justice *Wallis* in C. S. No. 141 of 1907 on the file of this court in its Ordinary Original Civil Jurisdiction.

K. Srinivasa Iyengar and *A. Krishnaswami Iyer* for appellants.

The Advocate-General (*P. S. Sivaswami Iyer*), *T. R. Venkatarama Sastri* and *A. Viswanatha Iyer* for respondents.

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* O. S. A. 14 of 1909. 12th March, 1912.

Venkatanarayana v. Subbammal.

K. Srinivasa Iyengar :—My first contention is that under the earlier will there is no authority for the widow to adopt when once the adoption of Venkatakrishna is completed. In clause 2 the testator says that in case he died before completing the adoption, Subbammall (the widow) is to complete the adoption. In the last clause but one again, he says that the wife is to adopt another boy in case a danger happens to the testator's grandson Venkatakrishna. The expression "grandson" indicates that the authority to adopt another boy is contingent on the death of Venkatakrishna before adoption.

My second contention is that even if the widow has the authority to make a second adoption under the first will, that authority is revoked by the second. On this point Mr. Justice *Wallis* has decided the question of construction in my favour though he holds that the revocation cannot take effect by reason of the second instrument being invalid as it purports to dispose of ancestral properties in which the deceased and Venkatakrishna were interested as co-parceners. The learned Judge ignores the distinction between an instrument being invalid on account of an intrinsic defect or a defect in execution or in style and an instrument being invalid on account of some circumstance *dehors* the instrument. This distinction is recognised in all the English cases beginning from *Exparte Ilchester*[1] to *Baker* v. *Story*.[2] There is no distinction between a case where there is an express revocation and a case of implied revocation. *Baker* v. *Story* [2] is a case of implied revocation.

The invalidity of the second will by reason of its being a disposition of ancestral property cannot certainly be described to be owing to an intrinsic defect. The defect is not intrinsic merely because there is a recital in the second will that the property in question is ancestral. A recital is only a piece of evidence. It cannot be contended that the defect is intrinsic when the ancestral character of the property appears from the will and that the defect is extrinsic when we have to rely on other evidence. [In support of the distinction drawn in English cases, the following cases, &c., also were referred to, *viz* :—*Quinn* v. *Butler* [3] ; *Re Carey*[4] ; CENT. DIG., Vol. 49, p. 563, Ill. (*i*), (*l*) and (*o*) ; *Carpenter* v. *Miller*.[5]]

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1. (1803) 32 E. R. 141, s.c. 7, Ves. 372.
2. (1874) 31 L. T. 631.
3. (1868) 6 Eg. 225.
4. (1901) I. Ir. Rep. 81.
5. (1869) 100 Am. Dec. 744.

Venkata-narayana *v.* Subbammal.

Reliance was placed on the analogy of the English cases, holding that an invalid exercise of a power of appointment may be evidence of intention—*Cohen* v. *Rowland*[1] ; *Willoughby Osborne* v. *Holyoake*[2]. Reference was also made to English cases under the old law, holding that a void conveyance may be evidence of an intention to revoke. *Alexander* v. *Kirkpatrick*[3], relied on by the court below, has no bearing on the present question. It deals with a question of conveyance and has no bearing on wills. Again the second instrument failed there on account of want of proper style. No conveyance was possible under the Scotch law without the expression "dispose" and the second instrument did not contain the expression. It was next urged that as probate was taken only of the second will, the court is bound to presume that that was the last will and testament of the deceased.

T. R. Venkatarama Sastri:—My first contention is that the provisions of the second will did not revoke the power to adopt in the earlier will either expressly or by implication. The contention of the appellant is it is revoked by implication. Where there are a number of wills and there is no revocation of the earlier wills, the wills should be read together as one testamentary instrument. The contention of the other side that the power to adopt given by the earlier will has been annulled by the provision for equal division is unreasonable. There is nothing to prevent a testator directing the adoption of one of a class and at the same time directing equal division of his property among the class. There is nothing inconsistent in that. Later will refers to property whereas earlier refers to adoption. Cl. (5) of the later will is not inconsistent with the earlier will. Later will does not contemplate that Subbamma would survive. The following cases were referred to:—*Townsend* v. *Moore*[4] ; *Barclay* v. *Maskelyne*[5] ; *Ganpat Ayyan* v. *Savithri Ammal*[6]. My next contention is that the later will was declared void by this court. So the second will cannot take effect. Possibily the adoption was due to that. There were other causes. The daughter had no other son. I refer to *Alexander* v. *Kirkpatrick*[3] ; *Baker* v.

1. (1894) I Ch. 406.
2. (1883) 22 Ch. D. 238.
3. (1874) 2 Sc. and Div. A. C. 397.
4. (1905) P. 66, 84.
5. (1858) 70. E. R. 365.
6. (1897) I. L. R. 21 M. 10.

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Story[1]; 100 Am. Dec. 744. The document was declared void by intrinsic invalidity and not by any circumstances *dehors* the instrument. *In Exparte Ilchester* [2] there was defective execution in the later document. Dependent relative revocation depends on defective execution—JARMAN 169; THEOBALD on *Wills*, p. 715-6; *Perrott* v. *Perrott*.[3] Wherever the invalidity appears on the face of the document it will not be effectual to revoke the earlier will. The question of dependent relative revocation is a question of intention in each case—*Tupper* v. *Tupper*[4]. The invalidity of the will does not affect the authority to adopt contained in the testamentary instrument—*Bachoo Harkisson Das* v. *Khushaldas*[5].

A. Krishnaswami Aiyar in reply :—The difference between invalidity arising by reason of intrinsic and extrinsic defects is one of principle. In the former case the instrument in non-existent or, to use the language in *Exparte Ilchester* [2], there is no evidence of an intention before the court. Or, as it is put in *Exparte Ilchester* [2] it is only an attempted disposition of property. In the latter class of cases there is a legal instrument, but the instrument fails on account of an extrinsic circumstance *dehors* the instrument. Under the earlier law an instrument invalid from any cause whatever operates as a revocation. The distinction in later cases is due to 12 Charles II, Ch. 24, which requires different formalities for a revocatory and a dispositive instrument. It was held by courts that an instrument which is dispositive in character but which did not comply with the formalities of a dispositive instrument cannot he held to be a revocatory instrument though the formalities of a revocatory instrument under the statute were complied with. This is the reasoning in all the decisions beginning from *Exparte Ilchester* [2]. The court is in a position to judge of the intention of the testator where the instrument is invalid on account of an extrinsic defect and therefore the courts have uniformly held that an instrument which is invalid on account of an extrinsic defect is still operative to revoke a prior valid instrument.

1. (1875) 31 L. T. 631
2. (1803) 32 E. R. 142.
3. (1811) 104 E R. 665.
4. (1855) 69 E. R. 627.
5. (1902) 4 Bom. L. R. 883, 888.

The case *Perrott* v. *Perrott*[1] relied on by the other side points out the distinction. A case of conveyance stands altogether on a different footing. The effect of a subsequent conveyance upon a prior will is not by way of revocation but by ademption. The effect of a valid conveyance is that the property dealt with under the conveyance ceases henceforward to be the property of the testator. A conveyance need not satisfy the requirements of wills and yet the will may cease to be operative to the extent of the conveyance. The case *Perrot* v. *Perrott* [1] relied on by the other side and by the court below is distinguishable. There there was a prior conveyance which created a right in certain parties though there was a reservation of a clause of revocation under it. The second conveyance was inoperative as the expression " dispose " was not in it. Under the circumstances it was held that the original owner did not resume dominion over it. In the case of a will no immediate rights are created. We are only concerned with intention. The second conveyance was invalid on account of an intrinsic defect. The principles land down in *Exparte Ilchester* [2] are not dissented from.

The Court delivered the following

JUDGMENT :—This is a suit for declaration that an alleged adoption of the 2nd defendant by the 1st defendant, the widow of one Venkatrama Pillai, is invalid.

On September 8, 1889, Venkatrama Pillai made a will (Ex. 1). The will stated that he had selected, or nominated, as his adopted son one Chiranjeevi Venkatakristna Pillai, the son of his daughter Rajammal, and that in case he should die before completing the adoption, his wife should complete the necessary ceremonies. The will directed that all the testator's properties should go to Chiranjeevi Venkatakrishna Pillai. It further directed that in case Chiranjeevi Venkatakrishna Pillai should die during the lifetime of the testator's widow she should, according to her wishes, adopt one of the other sons of the testator's daughter, Rajammal, and give the properties to him.

On February 9th, 1890, Venkatarama Pillai adopted Chiranjeevi Venkatakrishna Pillai.

1. (1811) 104 E. R. 665. 2. (1803) 32 E. R. 141.

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On March 21st, 1890, he made another will. This will makes no reference to the earlier will. The will directs that on the death of Chiranjeevi Venkatakrishna Pillai the property disposed of by the will should go to his issue, and that if he dies without issue, it should go to the issue of Rajammal that is to say, to Chiranjeevi Venkatakrishna Pillai's brother.

On June 4th, 1891, Chiranjeevi Venkatakrishna Pillai died. The second will was proved. The first was not. The second will which purports to dispose of the joint family properties of the testator and Chiranjeevi Venkatakrishna Pillai was, by a decree of this court dated November 20th, 1894, held to be void.

The widow, purporting to act on the power conferred by the first will, on August 13th, 1906, adopted another son of Rajammal, the 1st defendant's daughter. The plaintiff, who is the reversioner, alleges that the widow had no authority to make the adoption and claims on the footing of an intestacy.

Mr. Justice *Wallis* held, and we agree with him, that the second will was inconsistent with the first and that if the second will had been operative, there would have been a clear revocation of the earlier will. There remains, however, the further question —and this was the main question argued in the appeal—does the second will, although inoperative as a testamentary disposition of the property with which it purported to deal, revoke the authority to adopt conferred by the first will? *Wallis* J. answered this question in the negative, and, although the point is not free from difficulty, we have come to the conclusion that he was right.

The answer to the question we have to determine would seem to depend on whether what is termed in the books the doctrine of dependent relative revocation applies to this case. This doctrine is discussed in the last edition of JARMAN on *Wills* on pages 148, 169 and 170. One would have thought that *prima facie* a devise which was inoperative as a disposition of property would have been inoperative as a revocation of an earlier disposition. But the courts have recognised a distinction between cases where the infirmity of the second will was apparent on the face of the will and the defect was intrinsic, and cases where the will was inoperative for reasons outside the instrument, *i. e.*, where the defect was extrinsic. In the former case the second devise would not operate as a revocation of the earlier devise. In

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the second case, it would. In *Tupper* v. *Tupper*[1] where a testator by his will bequeathed valid legacies to various persons and by a codicil revoked them "and in lieu thereof" bequeathed a legacy which failed under the MORTMAIN Acts, it was held the revocation took effect. (In this case, it is to be noted there was an express revocation). It has also has been held that where the second devise failed through the incapacity of the devisee, the prior devise was revoked (see the cases cited in JARMAN on *Wills* page 170.) In *Baker* v. *Story*[2] Sir *G. Jessel* held that, where a testator by his first will devised his real estate to his widow absolutely and by his second will, which contained no clause of revocation, devised his real estate to his widow for life and after her death to charity, although the devise to the charity was void the absolute devise to the widow was revoked. In *Exparte Illchester*[3] it is said that where the second instrument failed of effect "by some accident independent of the instrument," it yet produced a revocation.

Instances of cases where the defect in the second instrument was a formal defect (*e. g.*, non-compliance with the Statute of Frauds) apparent on the face of the instrument, and the courts have held that the earlier instrument was not revoked, are to be found in *Onions* v. *Tyrer*[4] and *Eilbeck* v. *Wood*[5].

It may no doubt be said with some force that a case where the second instrument though failing through the incapacity of the devisee, nevertheless operates as a revocation of an earlier instrument, is not easily distinguishable from the case like the present where the second instrument fails by reason of the fact that the property which the testator purports to dispose of cannot be made the subject-matter of testamentary disposition. The incapacity of the devisee, however, is not necessarily apparent on the face of the instrument, whereas in the present case the fact that the testator purports to dispose of ancestral property is apparent on the face of the will, and this, as it seems to us—if we are to decide this case with reference to this doctrine of dependent relative revocation—brings it within the class of cases where the defect in the second instrument may be said to be intrinsic and not extrinsic.

1. (1855) 69 E. R. 627.
2. (1875) 23 W.R. 147.
3. (1803) 32 E.R. 142 at 150.
4. (1716) 24 E.R. 418.
5. (1826) 38 E. R. 217.

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Wallis J. held, on the authority of the House of Lords decision in a Scotch case *Alexander* v. *Kirkpatrick*[1], that the second will in the present case did not operate so as to revoke the authority to adopt conferred by the first. *Wallis* J. observed: "In that case a husband and wife executed a conveyance of the same property to others without any reference to the previous conveyance just as here. The later conveyance was held inoperative for want of apt words and under these circumstances the House of Lords held that this inoperative conveyance did not revoke the earlier and effective disposition of the same property. The fact that in the present case the earlier will does not, strictly speaking, contain a disposition of property, but only an authority to adopt which, if exercised, would operate as a disposition of the property, does not appear to me to make any difference. Mr. Tirunarayana Charry for the plaintiff cited two English cases *Tupper* v. *Tupper*[2] and *Quinn* v. *Butler*[3] both anterior to *Alexander* v. *Kirkpatrick*[1] Some of the English cases have held that the doctrine does not apply where the failure of the later instrument is due to the incapacity of the devisee to take a limitation which rests on the authority of a very old case, *French's case*, [4] rather than on principle. This was pointed out by Lord *Romilly* in *Quinn* v. *Butler*[3]. who held that when the donee of a power expressly revoked an appointment made under the power and proceeded to make a fresh appointment which failed because it was not according to the power, the expressed intention to revoke must be given effect to. This appears to me one of the English cases which Lord *Cairns* refers to in *Alexander* v. *Kirkpatrick*[1] and distinguishes without expressing any opinion as to whether they were rightly dicided, on the ground that the later instrument contained an express revocation of the earlier. In *Re Fleetwood Sidgreaves* v. *Brewer* [5] where a testatrix executed a fourth codicil containing dispositions inconsistent with those she had previously made, but the fourth codicil failed as it was attested by one of the beneficiaries under it, V. C. *Hall* observed: "There is not in the fourth codicil any express revocation of the will and first, second and third codicils, and the fourth codicil being executed in order to create new interests which fail, the original instruments of

1. (1874) 2 Sc. and Div. A. C. 397.
2. (1855) 1 K. & J. 665 S. C. 69 E. R. 627.
3. (1868) 6 Eq. 225.
4. Roll's Abridgment Devise, 64.
5. (1880) 15 Ch. D. 594.

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disposition were unaffected on the principle of *Onions* v. *Tyrer*[1] (In P. Williams 343) and other cases." I may add that to let in the doctrine it is not necessary that the later instrument should fail altogether for in *Onions* v. *Tyrer*[1] the later will was good as to personality, but bad as to reality.

In *Alexander* v. *Kirkpatrick*[2] Lord *Cairns* distinguishes between cases in which the later instrument contains express words of revocation as to which cases he says there may be some doubt and cases such as the present where there are no express words of revocation. As regards the latter, he says at page 493; "It appears to me that no case has been produced and no case can be produced either in Scotland or in England where a mere alternative inconsistent disposition which is not valid or effectual in itself has been held to revoke an earlier disposition of the same property." Lord *Chelmsford* takes the same grounds. Lord *Hatherley* who had decided the English case of *Tupper* v. *Tupper*[3], at page 404, speaks of that class of cases in which a changed disposition having been intended to take effect but the changed disposition itself having failed to take effect the intention to revoke is not any further to be presumed from it; and Lord *Selborne* says that the heir at law (here the reversioner) is bound to make out with a reasonable certainty a revocation of the prior independently of the disposition in the later. I think we must accept the law laid down by these high authorities as the rule of justice, equity and good conscience applicable by us.

No doubt the two instruments in question in *Alexander* v. *Kirkpatrick*[2] were conveyances and no question of the intention of a testator to be gathered from the terms of a will arose. (This may account for the fact that we find no references to this case in Mr. Jarman's book or in Theobald's book). Lord *Hatherley*, however, in his judgment in *Alexander* v. *Kirkpatrick*[2] 'considered some of the will cases and observed: "The court feels itself in this position according to the case cited by Mr. Pearson in *Onions* v. *Tyrer*,[1] (in P. William 343) that it can discover an intention to revoke only in the altered disposition which is attempted to be made by the second instrument; and if that

1. (1716) 24 E. R. 418. 2. (1874) Sc. and Div. A. c. 397.
3. (1885) 1 K. & J. 665 s. c. 69 E. R. 627.

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disposition fails, then also the court must fail to perceive an indication of an intention to revoke the first, the court not being able to find that there is in truth any inconsistent disposition at all in consequence of that which was intended to be such having wholly failed to take effect." We are prepared to apply the principles of this decision to the cases before us and to hold that the authority to adopt was not revoked. The other points raised in the appeal were not very seriously pressed.

We are of opinion that the fact that the testator himself adopted, did not put an end to the authority to adopt, conferred by the first will, and we agree with *Wallis* J. that in a suit for declaration the earlier unproved will is admissible in evidence.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Bakewell.

Sivavadivelu Pillay	..	Appellant in both* (*Plaintiff*)
v.		
Ponnammal	..	Respt. in S. A. 1406 (*Defendant*).
Govindammal & another	..	Respts. in S. A. 1424 (*Defendants*).

Sivavadivelu v. Ponnammal.

Limitation Act, Arts. 44, 144—*Suit by minor for declaration and recovery of property alienated by guardian.*

Art. 44 and not Art. 144 is the article applicable to a suit for a declaration that a sale of plaintiff's property by his mother as guardian is not binding on him, and for possession and mesne profits. [*Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram* 1 and *Madugula Letchiah* v. *Palli Mukkalinga* 2 followed.]

Second appeals from the decrees of the District Court of Tanjore in A. S. Nos. 604 and 636 of 1909 presented against the decrees of the Court of the District Munsif of Tiruvalur in O. S. Nos. 193 and 192 of 1908.

The facts appear sufficiently from the judgment.

M. D. Devadoss for appellant:—*Unni* v. *Kunhi Amma*[3] still remains good law and has not been affected by *Gnana*

* A. S. Nos. 1406 & 1424 of 1910. 9th February, 1912.

1. (1899) I.L.R. 23 M. 279 (P.C.) 2. (1907) I.L.R. 30 M. 593.

3. (1890) I. L. R. 14 M. 26.

Sivavadivelu v. Ponnammal.

Sambanda Pandara Sannadhi v. *Velu Pandaram*[1]. *Kamakshi Nayakan* v. *Ramasami Nayakan*[2] also is in my favour. The true test is—Whether the sale is sought to be set aside or whether it is open to the minor to sue for possession without seeking to set aside the document ? *Gnana Sambandha Pandara Sannadhi* v. *Velu Pandaram*[1] applies both Art. 44 and Art. 144. The effect of it is, whichever is the longer period is to apply. Mr. Justice *Abdur Rahim*, in *Doraisami* v. *Nondisamy Saluvan*[3], is of this opinion. Mr. Justice *Sundara Aiyar* expresses no opinion. In *Madugula Letchiah* v. *Pally Mukkalinga*[4] the report is not clear as to the circumstances under which the sale was effected by the guardian. It is just possible that the sale was only voidable and not void. Anyhow, it does not notice *Unni* v. *Kunhi Amma*[5]. Nor is this case cited before the Privy Council. No argument was made before the Privy Council of the relative applicability of Art. 44 and Art. 144. The only question in that case was whether, if the father was barred, the son also was barred, or whether he had a fresh right on the death of the father. That the father was barred was admitted on all hands. See *Velu* v. *Pandaram*[6].

T. Natesa Aiyar for respondent:—The *dictum* of the Privy Council applies to this case. The reason why both Art. 44 and Art. 144 are referred to is because there was a possible doubt in that case, the sale being only of the office, if Art. 44 would apply to the properties. *Madugula Letchiah* v. *Palli Mukkalinga*[4] applies and cannot be distinguished.

The Court delivered the following

JUDGMENT:—[S. A. 1406].—The plaintiff in this case prays for a declaration that a sale of the plaintiff's property by his mother as his guardian is not binding on him, and for possession and mesne profits. Both the lower courts have held that the plaintiff failed to adduce sufficient proof of his age; and the question for decision is whether the period of limitation is 12 years from the date of alienation in 1904, under Article 144, or 3 years from the date of the plaintiff's majority under Article 44, of the Limitation Act, 1887. We are of opinion that the case

1. (1899) I.L.R. 23 M. 279 (P.C.)
2. (1896) 7 M.L.J. 131.
3. (1911) 21 M.L.J. 1041.
4. (1907) I.L.R. 30 M. 593.
5. (1890) I. L. R. 14 M. 26.
6. (1895) I.L.R. 19 M. 243.

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falls within the decision of the Privy Council in *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram*[1] which was followed by this court in *Madugula Letchiah* v. *Pally Mukkalinga*[2] and that Article 44 applies. In view of these decisions we are unable to follow the cases in *Unni* v. *Kunhi Amma*[3] and *Kamakshi Nayakan* v. *Ramasami Nayakan*[4]. We may point out that in *Gnana Sambanda Pandara Sannadhi* v. *Velu Pandaram*[1], at page 279, the sale by the minor's guardian was held to be void and incapable of passing any title to the purchaser, while the ground of the decision in *Unni* v. *Kunhi Amma*[3] was that such a sale deed may be treated as non-existent, and the remedy of the minor is to sue for possession and not to set aside the sale.

The judgment in *Unni* v. *Kunhi Amma*[3] *is obiter* as regards a sale by minor's guardian which is the case specially provided for by Article 44, and no other authority appears to have been considered in the case reported in the Madras Law Journal.

The second appeal fails and is dismissed.

[S. A. 1424].—Second Appeal No. 1424 of 1910 follows Second Appeal No. 1406 of 1910 and for the like reasons as are recorded in our judgment therein, we dismiss this appeal also with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Abdur Rahim.

IN S. A. NO. 793 OF 1909.

Arunachalam Pattar	.. Appellant* (*Defendant*)
v.	
L. Seshan Pattar	.. Respondent (*Plaintiff*).

In C. R. P. No. 551 of 1909.

L. Seshan Pattar	.. Petitioner
G. Arunachalam Pattar	.. Respondent.

Costs—Contribution—Charge.

In a suit for contribution as to costs incurred to establish title in prosecuting a common litigation of plaintiffs and defendants as sole

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* S. A. No. 793 of 1909. 12th February, 1912.
C. R. P. No. 551 of 1909.

1. (1899) I. L. R. 23 M. 279
2. (1907) I. L. R. 30 M. 593
3. (1890) I. L. R. 14 M. 26.
4. (1896) 7. M. J. 131.

members of a Samuham owning property and entitled to emoluments attached to it, the costs payable by the defendants will be no charge on the defendants' share of the property belonging to the Samuham, especially where the title to the property was not directly the question in the suit and the agreement between the parties was not that the liability for costs of any property should form a charge on the property.

Arunachalam Pattar v. Seshan Pattar.

Second appeal from the decree of the District Court of South Malabar in A. S. No. 177 of 1908 presented against the decree of the Court of the Subordinate Judge of Palghat in O. S. No. 7 of 1904.

Petition under S 115 of Act V of 1908 praying the High Court ro revise the order of the District Court of South Malabar at Calicut in C. M. P. No. 49 of 1909 in A. S. No. 177 of 1908.

In S. A. No. 793 of 1909.

T. R. Ramachandra Aiyar and *C. V. Ananthakrishna Aiyar* for appellant.

The Advocate General (*C. F. Napier*) and *K. R. Subramania Sastry* for respondent.

In C. R. P. No. 551 of 1909.

The Advocate General (*C. F. Napier*) and *K. R. Subramania Sastry* for petitioner.

C. V. Ananthakrishna Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The facts upon which this second appeal arises may be shortly stated as follows:

There are two Brahmin villages in Palghat called Nurani and Thondikulam. The inhabitants of the latter who are represented by the defendant-appellant were sued by the plaintiff-respondent representing the former village for the recovery of a certain sum of money out of the properties of the village community represented by the defendant including its half share in certain samuham property and for declaration of a charge on this half share for the amount sued for. The samuham properties are properties which according to the plaintiff belong to the Palghat Cherry Samuham; *i.e.*, association or community, which consists of the villagers both of Nurani and Thondikulam. The money which the plaintiff seeks to recover by the suit represents a portion of the cost of certain litigation in the Cochin Court incurred by the representatives of Nurani Village on behalf of

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their own village and the Thondikulam village. The question involved in the Cochin suit was whether the inhabitants of these two villages alone composed the Palghat Cherry Samuham and were as such solely entitled to certain emoluments or gifts in connection with particular religious rites in the Cochin palace and to certain properties situate in Cochin or whether the Palghat Cherry Samuham consisted of one hundred and odd villages in Palghat Taluk including Nurani and Thondikulam. It was held that the Samuham consisted only of the villages of Nurani and Thondikulam and that they alone were entitled to the emoluments and properties in question in that suit. To that extent both the villages undoubtedly benefited by the litigation but so far as it appears, the title to the property now in dispute was not directly in question in the Cochin suit.

It has, however, been found that the representatives of the Thondikulam village expressly agreed to bear their share of the expenses of the suit and the villagers of Thondikulam are bound by that agreement. But that will not sustain a charge on the defendants' share in Palghat Cherry Samuham property assuming that they have a beneficial interest in such properties as found by the lower appellate court and are not merely trustees thereof along with the villagers of Nurani as contended before us in second appeal, nor would the fact that the decision of the Cochin Court is in favour of Nurani and Thondikulam villages on the issue whether the Palghat Cherry Samuham consisted of the inhabitants of these villages alone or of them and the Brahmins of a number of other villages, suffice to create a charge on the defendants' share in the Samuham property in respect of the defendants' share of the costs of the Cochin Suit. The learned pleader for the respondent has not in fact tried to support the position to the contrary by any authority and the principle enunciated by the Privy Council in *Abdul Wahid Khan* v. *Shahiba Bibi*[1] leads to the opposite conclusion. We may also point out that the agreement between the parties in this case, was that each of the villages should bear its proportionate share of the expenses of the suit and not that there should be a charge on any particular property belonging to the defendants' village for its share of the expenses.

1 (1893) I. L. R. 21 C. 496.

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The result will be that the decree passed by the lower court will be modified by substituting in the 2nd paragraph of the decree the words "from the community of Thondikulakkars" in place of the words "out of the interest of the Thondikulakkars in the Samuham property described in the schedule hereunto annexed" and in the 5th paragraph of the words "from the community of Nuranakkars" for the words "out of the interest of Nuranakkars in the said Samuham properties described in the said schedule" and by expunging the 6th paragraph. Each party will bear his own costs of this appeal and the civil revision petition.

It should be noted that we do not express any opinion on the question whether the finding of the lower courts that the plaintiffs' and the defendants' villagers are beneficial owners of the Samuham properties and not merely trustees of those properties is correct.

The memorandum of objections is dismissed. The civil revision petition is also dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

Vijayaraghava Reddi .. Petitioner* (*Plaintiff*)

v.

Komarappa Reddi and another .. Respondents (*Defendants*).

Vijayaraghava Reddi v. Komarappa Reddi.

C. P. C. (1882), *S.* 162—*No duty of court to bind down witnesses to appear.*

S. 162, C. P. C. (1882), does not impose any duty on the trial court to bind down the witnesses to attend at the adjourned date of hearing.

O. XLIII, r. 1 Cl. (*a*), C. P. C., does not give an appeal against an order of remand not passed under O. XLI, r. 23, C. P. C. (1908).

Petition under S. 115 of Act V of 1908 praying the High Court to revise the decree of the District Court of South Arcot in A. S. 249 of 1910 setting aside the decree of the Court of the District Munsif of Tindivanam in O. S. 96 of 1910 and remanding the O. S. to the said Court of the District Munsif for retrial.

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*A. A. O. No. 63 of 1911. 6th February 1912.
C. R. P. No. 78 of 1912.

Vijayaraghava Reddi v. Komarappa Reddi.

L. A. Govinda Raghava Aiyar and *A. Ramachandra Aiyar* for Petitioner.

C. Padmanabha Aiyangar for Respondents.

The Court delivered the following

JUDGMENT:—In this case the decree was passed by the District Munsif *ex parte*. An application was made to set aside the *ex parte* decree and refused, and there was no appeal from the order refusing to set aside *ex parte* decree. But an appeal was filed against the decree itself. The District Judge who heard the appeal holds that the defendants were not prevented by sufficient cause from appearing on the date fixed for hearing and conducting the case, but he has set aside the decree and remanded the case to the District Munsif for disposal after giving the defendants an opportunity to adduce their evidence on the ground that the District Munsif had adjourned the case on the 12th July to the 24th August 1910 not at the request of the parties but for want of time and failed to direct the witnesses who were present to appear on the adjourned date of hearing We do not propose to pronounce a definite opinion on the question whether the District Judge could, in hearing an appeal against an *ex parte* decree, set aside the decree and remand the case to the court of first instance, if a defendant was not given sufficient opportunity to adduce his evidence, or whether the proper procedure is not to ask the lower court to take further evidence and submit it to the appellate court for disposing of the appeal on the merits. In this case, the finding of the District Judge on the point is against the defendants as we read the appeal judgment.

The ground on which the order of remand is based is that the District Munsif ought to have directed the defendants' witnesses to appear at the next day of hearing and failed to do so. But we do not find any such duty was laid on the District Munsif. Section 162 of the Code of Civil Procedure, 1882, does not, as we read the section, impose any such duty on a trying court, though probably if an application is made by a party to that effect, the court may in a proper case bind down the witnesses to attend at the next date of hearing. The second paragraph of Section 162 only deals with the court's power to detain witnesses.

1. (1900) I. L. R. 24 M. 200.

Nor does *Subarayadu* v. *Chenchuramayya* [1] lay down any general rule to the effect supposed by the learned District Judge. We hold, therefore, that the District Judge's order of remand is without jurisdiction. We set aside the order and remit the appeal to the District Judge for disposal according to law. Costs will abide the result.

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We may add that we have treated the memorandum of Civil Miscellaneous Appeal as a Revision Petition, as in our opinion, Order XLIII, rule 1, cl. (*a*), Code of Civil Procedure, 1908, apparently does not give an appeal against an order of remand which is not passed under Order XLI, rule 23, of the Code of Civil Procedure, 1908.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Miller.

Annathurai Aiyar .. Appellant*
(*Plaintiff*)
v.
T. Ramanuja Chariar .. Respondent
(*Defendant*).

Evidence Act, S. 95—Admissibility of evidence—Words—"Kalan."

Evidence is admissible to show that the house intended by a vendor to be sold was a house other than that standing on the site referred to in the deed, having regard to the fact that otherwise the language used becomes meaningless with regard to existing facts.

The meaning of the word "Kalan" dwelt on.

Second appeal from the decree of the District Court of North Arcot in A. S. No. 221 of 1908 presented against the decree of the Court of the District Munsif of Vellore in O. S. No. 177 of 1907.

Annathurai Aiyar v. Ramanuja Chariar.

K. Srinivasa Aiyangar and *A. Krishnasami Aiyar* for appellant.

T. R. Ramachandra Aiyar and *V. S. Kallabhiran Aiyangar* for respondent.

The plaintiff bought from the defendant the house described in the plaint schedule and other property for a sum of Rs. 8,000 on 5th December 1898, and obtained possession of all the property sold. He continued in possession of that house

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1. (1900) I. L. R. 24 M. 209.

*S.A. No. 1439 of 1910. 4th March 1912.

Annathurai Aiyar v. Ramanuja Chariar.

until 23rd June 1901, when he was dispossessed by one Thepperumal Aiyangar who had obtained a decree for the same. The plaintiff alleged that the defendant made him believe that he owned the house and could sell it; that, however, it was found that he had no interest in it and that Thepperumal Aiyangar owned it; that as soon as he (plaintiff) learnt of the absence of title in the defendant and his own dispossession he (plaintiff) sent a notice to defendant on 1st September 1900 calling on the defendant to make good the loss so sustained; that the defendant, however, had not made any reparation; that because the defendant undertook to discharge any encumbrance or disputes (கலன்) but failed to restore to the plaintiff the possession of the house, he (defendant) is bound to pay damages for the breach of contract, the damages being the price of the house and interest thereon. The suit is accordingly, for recovering damages, assessed at Rs. 2,495. Defendant denied that he had no title or that he had made any representation to plaintiff such as was alleged by the plaintiff. He said that plaintiff was fully aware of the nature and extent of defendant's right and that plaintiff was himself to blame for allowing himself to be dispossessed by Thepperumal Aiyangar. The District Munsif found in favor of the plaintiff and gave him a decree. The District Judge found some of the issues against the plaintiff and directed that the suit be dismissed with costs.

The Court delivered the following

JUDGMENT:—Two questions have been argued. First it is contended that parol evidence was wrongly admitted to show that the upstair house described in Exh. G (item 2) was the house in reference to which the present dispute has arisen.

It is clear from Exh. G that the intention was to convey an upstair house and that house is described as included in, *i. e.*, standing on, a certain site which is also described and conveyed. When the document is applied to the facts existing at the date of the sale, it is found that the vendor had no upstair house on that site, but had one on the opposite side of the same street and no other in that town or elsewhere. Evidence has been admitted to show that he intended to convey that house. We think the evidence was admissible and that the words in the document which indicated that the house sold stood upon the site described

must be regarded as mere misdescription to be omitted from consideration. The second contention is that the Tamil word Kalan ' in the covenant on which the plaintiff relies is to be interpreted as meaning any dispute about the title, and not, as the lower courts have held, as referring to a defect in the title. On this point we think we must accept the interpretation of the District Munsif from which the District Judge has not dissented. Annathurai Aiyar *v.* Ramanuja Chariar.

This second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Ayling.

Muthayamanigaran .. Petitioner* (*Defendant*)

v.

Lakku Reddiar and others .. Respondents (*Plaintiffs*).

Contract Act, Ss. 73, 63, 55—Scope of—Damages—Measure of—Difference of price—Date of computation.

S. 65 of the Contract Act does not entitle a promisee for his own purposes and without the consent of the promissor to extend the time for performance which had been agreed to by the parties to the contract. S. 55 of the Contract Act does not enable the promisee to say that he elected to keep alive the contract in the hope of being able to claim heavier damages for the breach of the contract. Muthayamanigaran *v.* Lakku Reddiar.

Per *Ayling* J.:—S. 63 deals only with concessions on the part of the promisee advantageous to the promissor. S. 55, read with S. 2 (*i*) to relating revocation of the contract only means that the promissor loses the power to enforce the contract, *i. e.*, to claim any advantage due to himself thereunder. The promisee may enforce it or not as it suits him. In case he enforces it he can sue for damages naturally resulting from the breach which cannot include any aggravation of damages caused by the promisee's action or inaction subsequent to the breach.

Defendant contracted to deliver to plaintiff some candies of cotton at a certain rate within 60 days. He failed to so deliver. Plaintiff wrote a letter some months afterwards demanding delivery of cotton within a week, and again a month later he wrote a letter rescinding the contract and claiming, as damages, the difference between the contract price and the market price on the date of the last letter.

Held :—That the damages should be assessed with reference to the market rate on the date of expiry of the 60 days agreed upon as the time for delivery in the contract.

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* C. R. P. No. 894. 28th February, 1912.

Muthaya-manigaran v. Lakku Reddiar.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate Judge's Court of Tuticorin in S. C. S. No. 713 of 1910.

V. Purushottama Aiyar for T. R. Venktaramana Sastri for petitioner.

T. V. Seshagiri Aiyar for respondents.

The Court delivered the following

JUDGMENT:—*The Chief Justice.*—The question raised in this petition is as to the date with reference to which damages should be assessed in an action for breach of contract. The facts are these: On the 12th May 1909, the plaintiffs and the defendant entered into a contract for the delivery by the defendant of 6 candies of cotton at an agreed rate within 60 days of the date of the contract. The defendant failed to deliver within 60 days which expired on or about the 12th of July. On the 4th of September the plaintiffs wrote a letter to the defendant in which they referred to the agreement and intimated that if the defendant failed to deliver the cotton within one week after the date of the letter he would be liable for the loss that might befall the plaintiffs according to the market rate at the date of letter. The defendant took no notice of this letter. On the 3rd October the plaintiffs wrote to the defendant another letter in which they referred to their previous communication and gave notice to the defendant that as he had failed to deliver the cotton after the notice given, he was liable on the footing of the market rate at the date of this second letter and they demanded payment on that footing. The Subordinate Judge, by way of damages, gave the plaintiffs the difference between the market rate prevailing in October, that is at the time the second notice was given, and the contract rate.

I am unable to agree with the Subordinate Judge that the plaintiffs are entitled to damages on this footing. The judge refers to S. 63 of the Contract Act which empowers a promisee to extend the time for the performance of the promise. Of course it would have been open to the parties to extend the time by agreement, but there is no evidence of any consent by the defendant to any extension of the time and this is not a case in which it can be said that silence gives consent. In my opinion, it is clear that S. 63 does not entitle a promisee for his own purposes

and without the consent of the promissor to extend the time for performance which had been agreed to by the parties to the contract. The view of the learned Subordinate Judge was that at the time the suit was instituted, the contract of May the 12th was a subsisting contract. In support of this view Mr. Seshagiri Aiyar relied strongly on the terms of S. 55 of the Contract Act. He contended that under that section the contract was voidable at the option of the promisee, that is the plaintiffs, and as they had not avoided the contract, they were entitled to treat it as a subsisting contract at the date of the institution of the suit.

Now, in my opinion, S. 55 entitles a party to a contract where time (as in this case) is of the essence of the contract, to say, if he is sued upon the contract: "Time is of the essence of this contract; you have failed to comply with the stipulation as to time; I repudiate the contract." It does not enable the promisee to say: "I elect to keep alive this broken contract in the hope that I may hereafter recover heavier damages for the breach of the contract." Mr. Seshagiri Iyer contended that the only way by which a promissor who had broken his stipulation as to time could protect himself if the promisee did not avoid the contract would be to give notice that the contract was at an end. It seems altogether unreasonable to place any such obligation on a promisee when *ex concessis* the contract has been broken with reference to a matter which goes to the root of the contract. The object of S. 55 is to protect the promisee and is analogous to S. 39, as shown by the illustration to S. 39. This illustration is the statement of a case in which the promisee would be at liberty to put an end to the contract; so under S. 55, where a stipulation entered into by the promissor as to time, which is of the essence of the contract, is broken, the promisee is entitled to repudiate or put an end to or avoid the contract. No doubt S. 55 deals with the effect of a breach of a stipulation which is of the essence of the contract and does not deal with the question of damages, but the plaintiffs would only be entitled to damages on the footing of the market rate in October on the assumption that the contract was a subsisting contract in October. The contract in this case was broken in July and, in my opinion, came to an end in July, and there is no evidence of any agreement to extend by the parties.

Muthaya-manigaran v. Lakku Reddiar.

Chief Justice.

The cases to which Mr. Seshagiri Aiyar refers are clearly distinguishable. The case of *Ogle* v. *Earle Vane* [1] turned on the question where there was a new contract to which the Statute of Frauds applied. The court held there was no new contract but an extension of time by agreement. *Lush* J. said (page 284): "I see no reason why after a breach of contract by non-delivery at the proper time, the buyer should not wait at the express or implied request of the seller with an understanding between the parties that if the buyer should wait he would still be entitled, if the seller turned out ultimately unable to deliver, to do that which he was entitled to do in the first instance, namely go into the market and buy at the then price." Here the right of the buyer to go into the market and buy at the "then price" is based on the express or implied consent of the sellers.

In the case of *Ashmere & Co.* v. *Cog & Co.*[2] there was an agreement by the defendant to sell hemp to the plaintiff, the shipment to be made between certain dates. The agreement contained a provision, that if the goods did not arrive from loss of the vessel or other unavoidable cause, the contract was to be avoided. It became impossible (in a business sense) for the defendants to ship the hemp between the special dates. They shipped hemp on a later date (in September) and on October 27th declared against the contract. The plaintiffs refused to accept this declaration and returned it to the defendants who in November wrote that it was the only declaration they were in a position to make. The plaintiffs brought an action and it was held that they were entitled to damages with reference to the market price in November, when the defendants notified their inability to make a declaration in accordance with the contract. In this case the defendants by making the shipment in September and by declaring that shipment against the contract intimated that they treated the contract as a subsisting contract and having done that they could not be heard to say they were not liable for damages on the basis of the market price when they finally notified their inability to make a declaration in accordance with the contract.

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1. (1867) 2 Q. B. 275.
2. (1899) 1 Q. B. 43.

Muthayamanigaran v. Lakku Reddiar. Chief Justice.

In the case of *Nickoll & Knight* v. *Ashton Edridge & Co.*,[1] where the defendants had failed to perform their contract within the time agreed upon, the court held that they were protected by the terms of the contract and were not liable. Mr. Justice *Mathew*, however, dealt with the question of the measure of damages as if the plaintiff had been entitled to recover. In that case the event which rendered the contract impossible of performance occurred in December 1899, and in that month notice of the fact was given to the plaintiff. The contract was for the delivery of goods during January 1900. With reference to the question of damages *Mathew* J. observed : "It appeared that towards the end of December, the plaintiff might have obtained another cargo at the then market price which was much lower than the price at the end of January. But it was insisted for the plaintiffs that they were entitled to wait and watch the rising market until the end of January and then claim their damages on the footing of the then market price. In my opinion that contention was wholly untenable. Having regard to the decision in *Roth Co.* v. *Tay Sen*[2] I think the plaintiffs were bound to endeavour to mitigate the loss by acting as ordinary men of business would have acted, that is to say, by determining the liability at the earliest date at which they were able to obtain another cargo." In the case before us, I think damages should be assessed with reference to the market rate at the expiry of the 60 days agreed upon as the time for delivery in the contract. We must set aside the decree of the Sub-Court. The case must go back to the Subordinate Judge to be dealt with on this footing. The plaintiff must pay the costs in this court, the other costs to be dealt with by the Judge.

Ayling J.:—The facts of the case out of which this revision petition arises are simple. Defendant contracted on 12th May 1909 to deliver to plaintiff 6 candies of cotton at Rs. 147 a candy within 60 days. He failed to deliver. Neither party took any action on the expiry of the term allowed (12th July 1909). On 4th September 1909 plaintiffs wrote a letter, Exhibit B, demanding delivery of the cotton within a week. To this defendant made no reply. On 3rd October 1909 plaintiff wrote Exhibit C rescinding the contract and claiming Rs. 228 as damages, being

1. (1900) 2 Q. B. 298. 2. (1896) 1 Com. Cases 306.

Muthayamanigaran v. Lakku Reddiar. — Ayling J.

the difference between the contract price and the market price on that date.

He subsequently brought this suit for the recovery of this amount, and the Sub-Judge has given him a decree as sued for.

Defendant (petitioner) contends that plaintiffs are only entitled to damages on the basis of the difference between the contract price and the price on 12th July 1909 when the contract was broken by his failure to deliver. This is the only point argued.

The view of the learned Sub-Judge, that the power to extend the time of delivery which plaintiff claims, is conferred by S. 63 of the Contract Act seems to be untenable and is not seriously put forward before us. Section 63 deals only with concessions on the part of the promisee, advantageous for the promissor. As stated in CUNNINGHAM AND SHEPHARD on *Contracts*: "It is clear, however, that as the act of the promisee musbe in the nature of a concession advantageous to the promissor rather than to the promisee, so the consequence of the act must be the relieving of the promissor wholly or in part from his liability on the contract." The section cannot be invoked to support an extension of time by the promisee for his own benefit.

The only possible basis for plaintiff's claim is, in fact, S. 55 which makes the contract on failure of performance within the fixed time, voidable at the option of the promisee. It is contended by Mr. Seshagiri Iyer that this section confers on the promisee the discretionary right, although the promisee may have broken the contract by non-fulfilment within the time allowed, of tacitly treating the contract as subsisting for as long as he likes until it suits him to formally rescind it, that damages should be assessed with reference to the price at date of rescission, and that the promisee may defer rescission to such a date as will enable him to secure the largest amount in the shape of damages.

As some sort of safe-guard against this being pushed to obviously unreasonable lengths, he admits that the promissor may put an end to the contract on the expiry of the fixed term or afterwards by specifically stating his unwillingness to perform.

Section 55 contains no suggestion of such a proviso and one is *prima facie* inclined to hold that a reading of that section

which requires such an unauthorized modification to make it reasonable and workable is not the correct one.

It appears to me that S. 55 read with S. 2 (*i*) means nothing more than this; on the promissor's failure to perform within the contract time, he (the promissor) loses the power to enforce the contract, that is to claim any advantage due to himself thereunder. The promisee, on the other hand, has the option of enforcing it or not as may suit him. He drops it altogether and in some cases it would be to his interest to do so. If he elects to "enforce" it, he can only do so by suing under S. 73 for damages for breach, for the contract itself, being for performance within a date, which is past, is impossible of execution in terms. The damages for which he can obtain compensation under S. 73 are those "which naturally arose in the usual course of things from such breach or which the parties knew when they made the contract to be likely to result from the breach of it, which cannot include any aggravation of damages caused by the promisee's action or inaction subsequent to the breach."

This appears to be the natural, equitable meaning of the Act, and applying it to the present case, I think the damages should be reduced to the difference between the contract price and the price on 12th July 1909. I concur in the order proposed by the learned Chief Justice.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(FULL BENCH.)

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Sankaran Nair, Mr. Justice Abdur Rahim, Mr. Justice Ayling and Mr. Justice Sadasiva Aiyar.

On reference from Sundara Aiyar and Spencer JJ.

Bapu *alias* Andimulam Pillai .. *Petitioner**

v.

Bapu *alias* Krishnayen .. .. *Respondent.*

Cr. P. C., S. 195, Cl. 1, 6, 7, Sanction—Legal evidence, necessity of—Jurisdiction of High Court—Petition from order refusing to revoke sanction

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* Cr. Rev. C. No. 498 of 1911. 1st March 1912.
Cr. R. P. No. 372 of 1911.

Audimulam v. Krishnayen.

—*Nature of jurisdiction of High Court—Difference of opinion between Judges —Letters Patent, Cl.* 36—*Cr. P. C., Ss.* 429, 439.

By the Full Bench:—The power conferred upon the High Court by S. 195, Cl. 6, Cr. P. C. is not a part of the appellate and revisional jurisdiction of the High Court conferred by Ch. 31 and 32, Cr. P. C. It is a special power conferred by S. 195, Cl. (6): and when the Judges of the Division Bench hearing a case under Cl. 6 of S. 195, Cr. P. C., are equally divided the case is governed by S. 36 of the Letters Patent and not by S. 429 or S. 439 Cr. P. Code.

An order refusing to revoke a sanction is one "granting a sanction" and it is open to a party dissatisfied with the order to apply to a superior Court under Cl. 6 of S. 195, Cr. P. C.

Per *Sundara Aiyar* J. (*Spencer* J. dissenting):—A sanction in cases falling under Cl. (*b*) and (*c*) of S. 195 Cr. P. C. not based on legal evidence is illegal; and the same holds good where the investigation under S. 202, Cr. P. C. is made by a Police officer or by the Magistrate himself.

Obiter:—A sanction given under Cl. (*a*) of Sub-S. 1 of S. 195, Cr.P.C., and under S. 196 and 197, Cr.P. C., need not in all cases be based on legal evidence.

A Magistrate received a complaint of criminal breach of trust, examined the complainant under S. 200, Cr. P. C., and suspecting the complaint to be the outcome of jealousy referred it under S. 202, Cr.P.C., for investigation by the Police. On receiving the Police report, he dismissed the complaint under S. 203 Cr. P. C., and granted a sanction for prosecution of the complainant,

Held by *Sundara Aiyar* J. (*Spencer* J dissenting) that the grant of sanction was illegal, not being based on legal evidence.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revoke the sanction to prosecute the petitioner, granted by the Second Class Magistrate of Madura Town in M. C. No. 21 of 1910 and confirmed by the Madura Sessions Court by its order in C. M. P. Nos. 38 and 39 of 1911 (Cr. A. No. 3 of 1911 on the file of the Court of the District Magistrate of Madura).

L. A. Govindaraghava Aiyar and *K. Jagannatha Aiyar* for petitioner.

C. S. Venkatachariar for respondent.

M. D. Devadoss for the *Public Prosecutor* in behalf of the lower court.

* *M. D. Devadoss*:—There is only one appeal under S. 195, Cr. P. C. The Full Bench case of *Muthusami Mudaly* v. *Veeran Chetti*[1] is wrong and he referred to cases decided before that case.

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* Argument before the Full Bench.

1. (1907) I.L.R. 30 M. 382.

Andimulam v. Krishnayen.

[On their Lordships expressing an opinion that they were not prepared to differ from the latest Full Bench case in Madras, counsel began to argue the second point.]

When there is a difference of opinion between the judges hearing an appeal under S. 195, Cr. P. C., the procedure to be followed is that indicated in S. 429, Cr. P. C. The jurisdiction is only appellate. The words 'under this chapter' occurring in S. 428 are not to be found in S. 429. Section 429 governs all kinds of appeals, whether under that chapter or not. S. 429 overrides S. 39 of the Letters Patent. The procedure in appeal under S. 195, Cr. P. C., is the same as in other appeals—*Raj Kumar Singha* v. *Tincowie Muzumdar.*[1] [*Rahim* J.—That only decides that the appellant has a right to be heard). Procedure in other cases which are not appeals under the appellate chapter is the same as for appeals—*Queen Empress* v. *Dada Ana.*[2] See also *Ramsorya-all* v. *Queen-Empress*[3].

L. A. Govindaraghava Iyer:—S. 195 is a self-contained section. It confers a special jurisdiction on courts, and as such, when the High Court deals with an appeal under S. 195, Cr. P. C., S. 36 of the Letters Patent is applicable. If the opinion of the other side is to prevail, the result will vary according as the proceeding is in a civil or criminal matter. S. 98, C. P. C., will not cover a case such as this. S. 36 was applied in *Moothoo Varapu Seshayya* v. *Gatram Ramayya*[4]. Appellate jurisdiction includes all revisional jurisdiction. See *Chappan* v. *Mohidin Kutti*[5]. It has been held that there cannot be any remand or further enquiry in cases under S. 195—see *Krishna Reddy* v. *King-Emperor*[6]; also *Ramayya* v. *Venkatachella Padayachi*[7].

The Bench before which the case first came up delivered the following

JUDGMENTS:—*Sundara Aiyar* J.—This is an application for the revocation of a sanction granted by the 2nd Class Magistrate of Madura Town, to prosecute the petitioner for an offence

1. (1907) 12 C. W. N. 248.
2. (1889) I.L.R. 15 B. 452, 474.
3. (1900) I L.R. 27 C. 452.
4. (1911) 2 M.W.N. 526.
5. (1898) I.L.R. 22 M. 68. 80, 83.
6. (1909) 20 M.L.J. 102
7. (1907) I.L.R. 30 M. 311.

Audimulam v. Krishnayen.

Sundara Aiyar J.

under S. 211 of the Indian Penal Code. The petitioner, Audimulam, preferred a complaint against the respondent, Krishnaiyar, and his wife, charging them with criminal breach of trust in respect of some jewels entrusted to them at a marriage which took place in his house. The Magistrate suspected that the case was false and directed the Police Inspector of Madura to hold a preliminary investigation under S. 202 of the Criminal Procedure Code. The Inspector reported that the case was entirely false. Krishnaiyar thereupon applied for sanction to prosecute Audimulam for preferring a false complaint, an offence punishable under S. 211 of the Indian Penal Code, and the Magistrate granted the sanction. The District Magistrate, on application made to revoke it, refused to do so A further application was thereupon made to the Sessions Judge. He dismissed it, regarding it as an appeal presented out of time. The Sessions Judge is wrong in supposing that an application to a superior court to revoke a sanction granted by an inferior court is an appeal coming within the purview of Article 154 of Schedule II to the Limitation Act. Section 195 (Clauses 6 and 7) of the Criminal Procedure Code provides that "any sanction given or refused under that section by any court may be revoked or granted by the court to which appeals ordinarily lie from that court." But it does not provide in terms that an appeal lies from an order granting or refusing sanction. And Chapter XXXI of the Code, relating to appeals, does not provide that an appeal shall lie from an order granting or refusing a sanction. Proceedings instituted for such purpose have not, according to the practice of the courts, been registered or treated as appeals, but as miscellaneous petitions—see Rule 186 of the Criminal Rules of Practice. The power of the superior court, no doubt, is similar to what it possesses in appeals, but the same may be said of the powers of the High Court in proceedings in revision—see S. 439 of the Criminal Procedure Code—but this fact would not justify such proceedings being treated as appeals for purposes of time. I do not overlook the language of S. 426, which speaks of the powers of a court of appeal under S. 195, but that language is employed, in my opinion, only because it is the court to which an appeal lies from the decisions of the court granting the sanction that has got power to revoke a sanction or to give a sanction refused by an inferior court. The Sessions

Judge was therefore wrong in holding that the application to him was barred by limitation. We have consequently to decide whether the order granting sanction is right on the merits. Audimulam's complaint of criminal breach of trust was not tried on the merits by the Magistrate. On receiving the complaint, the Magistrate, to use his own words, "suspected that the complaint was the outcome of some jealousy," and he finally dismissed it on the report of the Inspector of Police. In granting sanction, the Magistrate says that he believes that "the complaint brought by the counter-petitioner is a deliberate concoction." This conclusion is evidently based on the report of the Police. The Magistrate was not able to come to any such conclusion from the evidence of the complainant recorded in court. His suspicion that the complaint was probably untrue was merely based on the ground that Krishnaiyer's mother, who, according to Audimulam, was his concubine, was a silk weaver and belonged to a different caste from Audimulam himself. The Magistrate's conclusion that the charge was false was therefore not based on legal evidence. The petitioner's argument, that a sanction not based on legal evidence is illegal, must be upheld.

Mr. Devadoss, appearing for the Public Prosecutor, relies on a *dictum* of my learned brother in *Moothavarapu Seshayya* v. *Gatram Ramayya*[1], that an enquiry held under S. 195 of the Criminal Procedure Code for deciding whether a sanction should be granted or not, need not be a judicial enquiry. The question argued in that case was whether a sanction granted without any enquiry for seeing whether there was a *prima facie* case against the accused was valid or not. The nature of the evidence which would justify a sanction did not arise for decision and the authorities relating to that question do not seem to have been brought to the notice of the court. It is quite clear to my mind that, in cases falling under clauses (*b*) and (*c*) of sub-section (1) of S. 195, a sanction can be granted only on materials which can be regarded as legal evidence according to the provisions of the Evidence Act. I feel no difficulty in holding that this rule is equally applicable, whether the investigation under S. 202 of the Criminal Procedure Code is

1. (1911) 2 M. W. N. p. 526 at 529.

Audimulam v. Krishnien. Sundara Aiyar, J.

made by a Police officer or by the Magistrate himself. The offences under clause (*b*), for which sanction is required, are offences committed in or in relation to a proceeding in a court, and those requiring sanction under clause (*c*) are offences committed by a party to a proceeding in a court in respect of a document produced or given in evidence in such proceeding. Such proceedings being of a judicial character, evidence can be admitted in them only in accordance with the provisions of the Evidence Act. It is true that a sanction given under clause (*a*) of sub-section (1) and sanctions under Ss. 196 and 197 need not in all cases be based on legal evidence. Some cases at least within clause (*a*) of S. 195 (1) have no reference to any judicial proceedings, and those within the purview of Ss. 196 and 197 are not connected with judicial proceedings at all. The sanction required is that of a public officer, contempt of whose lawful authority is the offence to be enquired into, or of an officer to whom he is subordinate, or of the Local Government or of the Government of India.

The point raised in the case is really concluded by authority. In *Queen-Empress* v. *Sheik Beari*[1] a Full Bench of five judges of this court affirmed the proposition that a sanction for preferring a false charge must be based on legal evidence. The facts of two of the cases before the Full Bench were very similar to those in the present case. *Muthuswami Aiyar* J. observes: "There can be no doubt that sanctioning a prosecution for an offence is a judicial act and the proceeding held in connection with it is a judicial proceeding * * * It seems to me, from the very nature of the case, that an opinion must be formed as to whether a sanction should be given or refused, upon legal evidence * * * * But in cases in which the Magistrate dismisses the original complaint upon a report from the Police, there is no legal evidence before him upon which he is in a position to frame his opinion. It is irregular to substitute the opinion of the Police officer who made the report for that of the Magistrate." *Kernan* J. says :—" It appears to me that a sanction granted by a Magistrate merely on the report of the Police is not the sanction required by law. The law requires the Magistrate to exercise his own judgment on the facts *proved* before him, and decide

1. (1886) I. L. R. 10 M. 232.

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whether the case is one in which sanction should be accorded. In *In re Paree Kunhammed*,[1] *Bhashyam Aiyangar* J. held the same view (see page 119). See also Weir's Criminal Rulings, Vol. I, page 188, Criminal Revision Case No. 367 of 1887, and *Queen-Empress* v. *Ganesh Ramakrishna*.[2] In *In the matter of Kalagava Bapiah*[3], *Bhashyam Aiyangar* J. points out the distinction between a sanction given under clauses (*b*) and (*c*) of S. 195 (1) and a sanction given under S. 197. He observes "A court granting sanction under S. 195, clauses (*b*) and (*c*), does so in connection with offences committed in or in relation to any proceeding in such court, and the court therefore acts in its judicial capacity in granting a sanction upon legal evidences But the Government, in according or withholding sanction under S. 197, for the prosecution of a public servant in respect of an offence alleged to have been committed by him as such public servant, acts purely in its executive capacity, and the sanction need not be based on legal evidence." The distinction between a sanction given for offences under clause (*a*) of S. 195 and clauses (*b*) and (*c*) is pointed out in *Jadu Nath Mahta* v. *Jagadish Chandra Deb*.[4] Where there are not sufficient grounds for granting sanction, it is open to a court to lay a complaint of offences referred to in clauses (*b*) and (*c*) of S. 195. Such a complaint cannot be interfered with by a superior court—see *Queen-Empress* v. *Venkanna*[5] and *Queen-Empress* v. *Sreenivasalu Nayudu*.[6] I am of opinion that the legislature intended in S. 195 to provide two alternative modes in which a court may proceed, one, to make a judicial pronouncement that there is a *prima facie* case for an enquiry into an offence, leaving the initiation of criminal proceedings to others, and the other, to put the criminal law in motion itself by a complaint. The two modes are, in my opinion, quite different in character.

In *Kachi Madar Lebbai* v. *The Emperor*,[7] I held that an order directing a prosecution under the allied section 476 must be based on legal evidence, and referred to S. 478, which empowers a court, to whose notice an offence referred to in S. 195

1. (1902) I. L. R. 26 M. 116.
2. (1897) I. L. R. 23. B. 50.
3. (1903) I. L. R. 27. M. 54.
4. (1902) 7 C. W. N. 423.
5. (1899) L. R, 23. M. 20
6. (1898) L. R. 21 M. 124
7. (1911) 2 M. W. N. 9.

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is brought in the course of a judicial proceeding, to complete the enquiry and commit the accused to a Court of Session —a provision which conclusively shows that the order of the court must be based on legal evidence. The case of *Queen* v. *Nujum Alli*[1] seems to have no bearing on the question, as what was decided in that case was that the admission of illegal evidence by a court convicting an accused person is not, of itself, sufficient ground for reversing the conviction, if, in the opinion of the appellate court, the other evidence on record would be sufficient to sustain it.

I am, for these reasons, of opinion that the sanction should be set aside.

Spencer J.—In this case, the Second Class Magistrate of Madura Town received a complaint of criminal breach of trust, and, after examining the complainant under S. 200 of the Criminal Procedure Code, suspecting the complaint to be the outcome of jealousy, he referred it, under S. 202 of the Criminal Procedure Code, to the Police for investigation. On receiving the Police report, he dismissed the complaint under S. 203 of the Criminal Procedure Code. The petitioner, whose prosecution was sanctioned, preferred an unsuccessful appeal to the District Magistrate. He next approached the High Court with a revision petition, which failed as he had not exhausted his right of appeal from the District Magistrate to the Sessions Judge. He then appealed to the Sessions Judge, but his appeal petition was dismissed for delay. He has again come to the High Court with a criminal revision petition.

In the first place, it may be noted that the Sessions Judge was not in order in treating the petitioner's application as one for the admission of an out-of-time appeal. There is no rule of law which subjects applications made under the special provisions of S. 195 of the Criminal Procedure Code to the periods of limitation contained in the Limitation Act. It was held in *Queen-Emperss* v. *Ajudia Singh*, [2] that Article 178 of Act XV of 1877 did not apply to applications made under this section.

1. (1866) 6 W. R. (Cr) 41, cited in (1911) 2. M. W. N. 526.
2. (1888) I. L. R. 10. A. 350.

Neither can appeals preferred under Clauses 6 and 7 of S. 195 be treated alike with appeals under Chapter XXXI, which are governed by Articles 154, 155 and 157 of the Limitation Act. While on the subject of limitation, I do not wish to be understood to say that delay is a matter that may be dismissed from consideration. Courts may, in the exercise of their discretion, refuse to grant sanction in cases where there is great delay in applying for it (*vide* C. M. P. No. 112 of 1897, Vol. II, Weir's Criminal Rulings, p. 154).

The objection is taken that the sanction is bad because it is based on the Police investigation and because the Magistrate made no independent judicial enquiry into the truth of the complaint beyond recording the complainant's statement on oath when the complaint was presented.

The petitioner's vakil relies on the decision reported in *Queen-Empress* v. *Sheik Beari*[1] and in *In re Paree Kunhammed*,[2] and also upon the case of *Kachi Madar Labbai* v. *Emperor*.[3]

The first of these is a decision by a Full Bench involving three distinct revision cases. In dealing with Criminal Revision Case No. 234 of 1886, *Kernan* J. observed : "It appears to me that sanction granted by a Magistrate merely on the report of the police is not the sanction required by law", and, referring to the circumstances of that particular case, which was instituted by information given, in the first instance, to a Village Magistrate and a Police officer and, later, by a complaint to a Second Class Magistrate, he observed further : "What the details of the statement of the accused to the Magistrate made on the 5th November were, does not appear. But I do not doubt that the Magistrate made such investigation as he thought the circumstances required, to satisfy himself whether an offence of false complaint was committed, and whether sanction ought to be granted before he made the order for sanction. He did not act merely on the report of the Police. If he had done so, his order, made merely on the Police report, should be held to be illegal." *Muthusami Aiyar* J. expressed the same principle in other words : "It is irregular to substitute the opinion of the

1. (1886) I. L. R. 10 M. 232. 2. (1902) I. L. R. 26 M. 116.
3. (1911) 2 M. W. N. 9.

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Police officer who made the report for that of the Magistrate." *Brandt* J. pointed out that the test to be applied is, whether or not the court giving or refusing the sanction had before it legal evidence upon which to form a decision, and that there cannot be said to be legal grounds for a decision as to whether sanction should be allowed or refused, where the original complaint is dismissed upon a reference to, and report made by, a Police officer *alone.*

The outcome of the Full Bench decision was that sanction was held to be not given improperly only by reason of previous notice not having been given, provided that the Magistrate who gives the sanction examines the complainant and gives him an opportunity of proving his complaint in a judicial enquiry. From the use of the expressions "legal evidence" and "judicial enquiry" in this decision, I do not understand the learned judges as meaning to lay down more than the principle, that the authority according sanction under S. 195 must act on his own judgment and not substitute for it the opinion of others. There is nothing in the Code to require a court to take statements of witnesses on oath, if it is considered necessary to hold a preliminary enquiry and if such an enquiry is held before the grant of sanction. Chapter XXV of the Criminal Procedure Code, which deals with the mode of taking and recording evidence in inquiries and trials, would not apply to such an enquiry, which is not expressly provided for by S. 195 or any other section in Chapter XV. In the present case, for instance, instead of referring the complaint to the Police for investigation, it was open to the Magistrate to have made an investigation himself into the truth of the complaint under S. 202 before issuing process, and statements made by witnesses at such an investigation would not have been recorded on oath, nor could sanction be accorded for prosecuting witnesses for false statements made at such an investigation as constituting an offence under S. 193, I. P. C.—*vide* Criminal Revision cases Nos. 503 and 514 of 1902, Vol. II, Weir's Criminal Rulings, p. 167 and *Queen-Empress* v. *Venkataramana*[1]. A Magistrate proceeding under S. 195 of the Criminal Procedure Code, would not be

1. (1899) I. L. R. 23 M. 223.

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wrong, in my opinion, if he took into consideration statements made before himself, not on oath, in the course of an investigation made by himself under S. 202 of the Criminal Procedure Code. I agree with the opinion of *Ayling* J. in the case of *Khadar Madar Labbai* v. *Emperor*[1] that an order under S. 476 of the Criminal Procedure Code need not necessarily be set aside because it proceeds wholly or partially on a consideration of the result of a preliminary enquiry under S. 202 of the Criminal Procedure Code. The decision of *Bhashyam Aiyangar* J. in *In re Paree Kunhamad*[2] does not go further than saying that the authority giving sanction under S. 195 should never be influenced in giving sanction by evidence which it ought to know, will be altogether inadmissible against an accused person in a criminal trial.

It is, no doubt, necessary to give complainants an opportunity of proving their case which has been thrown out merely on a Police report, before sanctioning their prosecution—vide *Queen-Empress* v. *Ganga Ram*[3] and *Government* v. *Karimdad*[4].

In the present case, according to the District Magistrate's order, it appears that this procedure was followed but no witnesses were examined by the petitioner or by any one on his behalf.

Supposing a complainant, to whom notice is given of a Magistrate's intention to deal with him under S. 195, declines to examine his witnesses, or, being given an opportunity of doing so, omits to take advantage of it, is the Magistrate bound to undertake *suo motu* a magisterial enquiry into the truth of the complaint ? I think not, if the Magistrate is satisfied on the material before him that there is a *prima facie* case for a prosecution, and that it is proper, in the interests of public justice, that the complainant should be prosecuted, although he, no doubt, has the power to make an independent enquiry, if not so satisfied—vide *Queen-Empress* v. *Motha.*[5] I may also refer in this connection to the case of *Baperam Surma* v. *Gowrinath Dutt*[6] and the observation of the learned Judges who decided that case, that

1. (1911) 2 M. W. N. 9.
2. (1902) I. L. R. 26 M. 116.
3. (1885) I. L. R. 8 A. 38.
4. (1880) I. L. R. 6 C. 496.
5. (1897) I. L. R. 20 M. 339.
6. (1892) I. L. R. 20 C. 474.

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the adoption of a rigid rule that a preliminary enquiry should be held in every case of sanction, would have the effect of introducing into the criminal procedure in this country a new stage as a matter of imperative necessity (p. 478). It was considered at one time in the history of sanctions that a court had no power to go beyond the record in determining whether or not sanction should be granted—*Zemindar of Sivagiri* v. *The Queen*.[1]. This view became altered after the passing of Act X of 1882, and the change found expression in *Queen-Empress* v. *Motha*[2]. The modern tendency of parties and practitioners is to expect a sort of preliminary trial in every case, and to appeal if the proof before the sanctioning court falls short of what would ordinarily be required for framing a charge in a warrant case. But S. 195 puts sanctions on a footing similar to that of complaints by public servants of offences against public justice, and it can hardly be suggested that any preliminary enquiry is necessary for complaints which are of matters within the knowledge of the court or public servant concerned.

Now, in the case before us, the Magistrate did not act merely on a Police report, for, he says he examined the complainant before he referred the matter to the Police under S. 202, and the result of his examination was that he at once suspected the truth of the complaint. The statement taken by the Magistrate from the complainant is not before us, so that I am not able to express an opinion that, taken by itself, it would not justify the Magistrate in thinking that a *prima facie* case was made out for prosecuting the complainant. It is impossible for me to discriminate and say how far the Magistrate's order was based upon his own enquiry and how far upon the Police investigation in a case where the sanction is not based entirely on a Police report.

I prefer to follow *Kernan* J. in the extract quoted above–*Queen Empress* v. *Sheik Beari*[3]—who, when the details of the statement did not appear, remarked that he did not doubt that the Magistrate made such investigation as he thought the circum-

1. (1887) I. L. R. 6 M. 29. 2. (1897) I. L. R. 20 M. 339.
3. (1886) I. L. R. 10 M. 232.

stances required, to satisfy himself whether an offence of false complaint was committed.

As regards the propriety of a prosecution, there can be no room for doubt here of this being an eminently fit case for prosecuting the petitioner, if his complaint was false, for his object, in the opinion of the Magistrate, was to use the facility afforded by the law as an instrument for putting pressure upon the person complained against to place his wife at the complainant's disposal.

In my opinion, the requirements of the law have been substantially complied with, and no case has been made out that would justifv us, acting as a court of revision, in quashing the sanction already accorded and confirmed by the proceedings of two superior courts.

I would therefore dismiss the petition.

The case having been set down to be spoken to for argument as to the result of the difference of opinion as above, upon hearing the arguments of the pleaders aforementioned, and the case having stood over for consideration the Court made the following

ORDER OF REFERENCE TO A FULL BENCH:—

In this case the High Court was invited to set aside a sanction granted by the 2nd class Magistrate of Madura Town. The District Magistrate refused to revoke the sanction on application made to him under S. 195, Clause (6), of the Criminal Procedure Code; and the Sessions Judge of Madura also refused to revoke it on a further application made to him under the same provision of law. In this court, we have been unable to agree on the question whether the sanction should be revoked or not, one of us holding that it should be, and the other, that it should not be revoked.

The question has now arisen: What is the result, or, what order is to be passed, when we differ in our opinions?

It is contended by Mr. Govindaraghava Aiyar, who appears for the petitioner, that the opinion of the Senior Judge should prevail, while Mr. Devadoss, appearing for the Public Prosecutor, contends that the case should be referred to a third Judge of this

Audimulam v. Krishnien. court with our opinions, under S. 439 of the Criminal Procedure Code. If the order be regarded as one passed under that section, it is not contended that Mr Devadoss is not right. But the petitioner argues that our jurisdiction was invoked by him under S. 195, Clause 6, and that S. 36 of the Letters Patent, according to which the opinion of the Senior Judge should prevail, is applicable to the case. It is admitted that S. 36 governs all cases which are not specially provided for by the Criminal Procedure Code or the Civil Procedure Code.

It has therefore to be decided, whether the provision in S. 439 of the Criminal Procedure Code, that "when the Judges composing a court of revision are equally divided in opinion, the case shall be disposed of in manner provided by S. 429," is applicable to the case.

We may, before proceeding further, observe that there was some controversy, at the hearing, as to whether the petitioner put in his application to this court under S. 195, Cl. (6), or under S. 435. The petition itself does not refer to any particular section. Of course, if the jurisdiction of this court could be invoked only in one particular manner, it can be regarded as exercised only in that manner. But, if the court has power to exercise its jurisdiction in more ways than one, then it would be open to a litigant to invoke it in any of the ways in which it might be exercised. Assuming at present that S. 195 (6) and S. 435 provide two different ways in which this court's jurisdiction may be exercised, we have come to the conclusion that the petitioner must be taken to have applied to the court to exercise its powers under S. 195 (6). At the heading of the petition, it is at first styled "Memorandum of Criminal Revision Petition," but it is subsequently described as "In the High Court of Judicature at Madras, Criminal *Miscellaneous Petition* No. 498 of 1911;" and the petition proceeds to say that the petitioner in this court begs to prefer this petition for the revocation of sanction granted by the Madura Sessions Court by its order in 'Criminal Miscellaneous Petitions Nos. 38 and 39 of 1911;" and the petitioner describes himself as "appellant," as is often done when proceedings are instituted under S. 195, Clause (6). Rule 186 of the Criminal Rules of Practice framed by this court provides that an

application made to the court under S. 195 of the Criminal Procedure Code for the revocation of a sanction "should be registered as a *Criminal Miscellaneous Petition* and not as a Revision Petition." As the petitioner intended to put in a Criminal Miscellaneous Petition and described himself as appellant, we are of opinion that the application should be taken to have been put in under S. 195 (6), if it could legally be presented under that section. Andimulam v. Krishnien

It is urged for the Crown that no petition would lie to this court under S. 195, Cl. (6), as the petition is not one asking us to revoke a sanction granted by the Sessions Court, as that court did not itself give any sanction, but only refused to revoke the sanction granted by the 2nd Class Magistrate, or, more correctly speaking, refused to set aside the order of the District Magistrate, who refused to revoke the sanction granted by the 2nd Class Magistrate.

For the petitioner it is argued that an order refusing to revoke a sanction must be regarded as one granting a sanction and that the application to this court should therefore be viewed as one for the revocation of a sanction granted by the Sessions Court. This is a question on which there is a conflict of authority. The petitioner's contention, if upheld, would lead to the result that, where a court subordinate to this court merely refused to revoke a sanction granted by an inferior court, the result of a difference of opinion between the Judges composing the bench hearing the petition would depend on whether the jurisdiction of the court is invoked under S. 195, Cl. (6), or under S. 435—the result being apparently different in each case. This has induced us to consider whether, in reality, the petitioner has an option to move this court in such a case either under S. 195 (6) or S. 435.

It seems to us that an order refusing to revoke a sanction cannot properly be regarded as an order granting a sanction. Cl. (6) of S. 195 provides that: "No sanction shall remain in force for more than six months from the date on which it was given, provided that the High Court may, for good cause shown, extend the time." It appears to us to be clear that the six months must be computed from the date of the order of the court which

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originally granted the sanction, and the contrary has, so far as we are aware, never been held. If an order refusing to revoke can be regarded as an order granting a sanction, the result would be that the sanction would be in force for six months from the date on which the last court whose jurisdiction is invoked, refused to revoke it, and, if that court is the High Court, for six months from the date of its order. And it would be unnecessary for the High Court in such cases to pass any order extending the time. This, in our opinion, was clearly not the intention of the legislature.

Besides, it seems to be hardly right to speak of an order refusing to revoke as an order giving a sanction which has already been given.

We have both come to the conclusion, as stated in our opinions on the petition itself, that an application under S. 195, Cl. (6), cannot strictly be regarded as an 'appeal.' The jurisdiction exercised by a court under that clause may no doubt be regarded as similar to an appeal. But it may also be regarded as similar to a revisional jurisdiction.

It will be noted that Clause (6) applies not only to cases of application to a superior court of justice, but to superior executive officers or to Government, to whom the authority granting the sanction is subordinate, and the legislature appears to have deliberately refrained from describing the proceeding before the superior officer as either "appeal" or "revision." In *Muthusami Mudali* v. *Veeni Chetti* [1] a bench of three learned Judges of this court held "that an order revoking a sanction is a refusal of a sanction and that an order confirming a sanction is the giving of a sanction," while two other learned Judges, *Benson* and *Wallis* JJ. expressed a contrary opinion in their order of reference to the Full Bench. In *Palaniappa Chetti* v. *Annamalai Chetti* [2] which was approved in *Muthusami Mudali* v. *Veeni Chetti* [1]; *Bhashyam Aiyangar* and *Boddam* JJ., in speaking of an order refusing to revoke a sanction, observed: "An order passed by the court of appeal is in law the order which ought to have been passed by the subordinate court and will

1. (1907) I. L. R. 30 M. 382. 2. (1903) I. L. R. 27 M. 223.

have the same efficacy and operation as the order which ought to have been passed by the latter." But the learned Judges proceed to say: " S. 439, Criminal Procedure Code, provides that the High Court, as a court of revision, may exercise the powers conferred on a court of appeal by S. 195." It is, by no means, clear to us that they intended to lay down that the High Court's jurisdiction in setting aside an order refusing to revoke a sanction is to be exercised under S. 195, Cl. (6), and not under Ss. 435 and 439. The jurisdiction of the court was as a fact exercised in this case not under either of those sections but under S. 15 of the Charter Act, the order refusing to revoke having been passed by a civil court. In *Hamijuddi Mondol* v. *Damodar Ghose*,[1] *Rampini* and *Geidt* JJ. held that an order refusing to revoke is not an order granting a sanction. In *Habibar Rahaman* v. *Khoda Bux*,[2] *Rampini* and *Mookerji* JJ. held a contrary view. The judgment contains no reference to the previous judgment in *Hamijuddi Mondol* v. *Damodar Ghose*[1]. The Allahabad High Court, in *Emperor* v. *Serh Mal*,[3] has dissented from *Muthusami Mudali* v. *Veeni Chetti*[4]. In *Habibar Rahaman* v. *Khoda Bux*[2], the order refusing to revoke is regarded as an order confirming a sanction. The language employed by the learned judges in *Palaniappa Chetti* v. *Annamalai Chetti*[5] seems, to some extent, to support this view. No doubt, where a court of appeal has plenary jurisdiction over a cause, its function is, not merely to refuse to interfere with the decision of the court from whose decision the appeal is preferred, but also to confirm it; and its judgment when it does so, takes the place of the judgment of the court of first instance. The sections relating to appeals in both the Civil and Criminal Procedure Codes lay down explicitly that the appellate court is to confirm the judgment of the first court where it does not interfere with it. But it appears to us that the function of a superior court is not the same where its powers of interference are limited to special grounds. A court of error does not confirm the judgment of the inferior court whose decision it refuses to interfere with. The same would seem to be the case with respect to a court of revision

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1. (1906) 10 C. W. N. 1026.
2. (1906) 5 C. L. J. 219.
3. (1908) I. L. R. 30 A. 243.
4. (1907) I. L. R. 30 M. 382.
5. (1903) I. L. R. 27 M. 223.

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and the court of second appeal in civil cases where there is no question of law and the court merely dismisses the second appeal on that ground. With all deference, it seems to us that it should not be assumed that a court refusing to revoke a sanction under S. 195, Cl. (6), can be taken to confirm the sanction, so as to make the sanction one granted by itself. The provision with regard to extension by the High Court of the time during which the sanction is to be in force seems to us to be a strong argument against such a view. That provision does not seem to have been brought to the notice of the court in *Muthusami Mudali* v. *Veeni Chetti.*[1]

Mr. Devadoss contends that all applications to the High Court in any matter relating to a sanction must be regarded as petitions for revision. This contention is, in our opinion, untenable. Section 439 itself seems to supply a conclusive answer to the argument. It provides that in revision the High Court may exercise the powers conferred on a court of appeal by Ss. 195, 423, 426, 427 and 428. The powers under the last four sections, which apply primarily to appeals, are exercisable in revision which is not an appeal. Similarly the power under S. 195, which primarily vests in a court of appeal, is exercisable by the High Court in revision. If the court which gives or refuses a sanction is immediately subordinate to the High Court, S. 439 would not be necessary to give it power to revoke or give the sanction given or refused, as S. 195 itself gives it. The exercise of powers under S. 439 cannot itself be an exercise of it under S. 195, though it is of the same kind of power as is given by S. 195. Where the court giving or refusing sanction is not immediately subordinate to the High Court, it has undoubtedly powers of revision under S. 439, whether it has power under S. 195 or not. But S. 439 seems clearly to show that a proceeding before the High Court under S. 195 cannot itself be regarded as a proceeding under S. 439. No doubt, S. 439 refers to "any proceeding, the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge." But this will not

1. (1907) I. L. R. 30 M. 382.

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justify a proceeding under S. 195 being regarded as a proceeding which "comes to its knowledge" within the meaning of the section. The clause appears to relate only to the source of knowledge of the High Court regarding the proceeding sought to be revised. That source may be either information received by itself directly (as by examination of a criminal calendar sent up to it) or a report made by an inferior court or information received otherwise. This last source seems to refer to information derived from the accused or complainant or the Crown through the Public Prosecutor. A different construction would have the result of including appeals also within the purview of S. 439. We therefore cannot accept the argument that proceedings under S. 195 are *ipso facto* proceedings under S. 439. If an order refusing to revoke a sanction cannot be regarded as one granting a sanction, then the High Court's powers of interference with such an order would be only in revision under S. 439, and the rule laid down in S. 429 will regulate the procedure to be followed in cases of a difference of opinion between the Judges hearing the application, and this is the view we are inclined to take.

Mr. Devadoss contends that, even if an application under S. 195, Cl. (6), cannot be regarded as one under S. 435, the proper course in case of difference of opinion is to follow the procedure laid down in S. 429, and he refers to two cases in support of this contention—viz., *Queen-Empress* v. *Dada Ana*[1] and *Queen* v. *Mukhun*.[2] In the first case *Jardine* and *Candy* JJ. held that, where there was a difference of opinion in a reference by a Sessions Judge under S. 307 of the Criminal Procedure Code, the proper course was to refer the case to a third Judge. The point was not argued, as stated in the judgment—see page 474. The learned Judges say: "There appears to have been no previous instance of Judges differing on a reference made under S. 307. In a case under the corresponding section of the older code, *Queen* v. *Mukhun*,[2] the course adopted by the High Court of Bengal was to lay the case before a third Judge. "We are of opinion that S 307 with perhaps S. 439 applies S. 429 about appeals to cases of reference and that this seems the justest and best procedure to follow. So we adopt the example of the Calcutta court and do not dispose of the case in the manner provided by Cl. 36 of our amended Letters Patent, *i. e.*, by the opinion of the senior Judge." The learned Judges treated themselves as a court of revision in hearing a reference under S. 307.

1. (1889) I. L. R. 15 Bom. 452. 2. (1877) 1 C. L. R. 275.

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Assuming that this view is correct, regarding which we express no opinion, the present case is not one of a reference by a lower court.

Queen v. *Mukhun*[2] was also a case of reference with respect to the verdict of a jury. The question of the procedure to be followed in case of a difference of opinion is not discussed. If the view taken in *Muthusawmi Mudali* v. *Veeni Chetti*[1], that an order refusing to revoke a sanction is tantamount to one granting a sanction, be adhered to, the question of procedure in case of a difference of opinion is likely to be of frequent occurrence. It may also arise in cases where the High Court is asked to interfere with an order granting or refusing a sanction passed by a court immediately subordinate to it. We consider it desirable that the question should be authoritatively decided and we therefore refer to a Full Bench the following questions :—

(1) Is an order refusing to revoke a sanction one granting a sanction, in which it is open to a party dissatisfied with the order to apply to a superior court under S. 195, Cl. (6), Cr.P.C.?

(2) Is the procedure described in S. 429, C. P. C., or in Cl. (36) of the Letters Patent to be followed where an application to the High Court is made under S. 195, Cl. (6), to revoke a sanction granted by a lower court or to give a sanction refused by it, when the judges composing the bench hearing the application differ in opinion ?

This case coming on for hearing in pursuance of the above order, and upon hearing the arguments (noted at the beginning of this case) of the pleaders aforementioned, the Court expressed the following

OPINION:—We are not prepared to dissent from the conclusion arrived at by a Full Bench of this court in *Muthusami Mudali* v. *Veeni Chetti*. [1]

We think, however, the power conferred upon this court by S. 195, Cl. (6), of the Code of Criminal Procedure is not a part of the appellate and revisional jurisdiction of this court conferred by Ch. 31 and 32 of the Code of Criminal Procedure. It is a special power conferred by S. 195, Cl. (6). It follows, therefore, that when the Judges are equally divided the case is governed by S. (36) of the Letters Patent and not by S. 429 or S. 439 of the Code of Criminal Procedure.

Our answer to the first question referred to us is in the affirmative. Our answer to the second question is that, in the case stated, the procedure described in Cl. (36) of the Letters Patent is to be followed.

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1. (1877) I.C.L.R. 275. 2. (1907) I. L. R. 30 M. 382.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar.

Sivaprakasam and others	..	Petitioners*
v.		(*Respondents*)
Palaniappa Mudaliar	..	Respondent
		(*Petitioner*).

Abatement—Costs—Deceased defendant's representatives' claim to.

If a suit abates on the ground that no representative of a deceased defendant is brought on record, there is no provision entitling the representatives of the deceased defendant to come to court and ask for the costs of the suit.

Sivaprakasam v. Palaniappa Mudaliar.

Quaere:—Whether the representatives can file a separate suit for the costs incurred by the deceased party?

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Mayavaram in C. M. P. 825 of 1905 in O. S. No. 243 of 1904.

S. Muthiah Mudaliar for petitioners.

The Court delivered the following

JUDGMENT:—This is an application under S. 115, Civil Procedure Code, to revise the order of the District Munsif of Mayavaram in Miscellaneous Petition No. 825 of 1905 in so far as he refused to award to the petitioners here, the costs which had been incurred by their mother in O. S. 243 of 1904. It is necessary to state the facts briefly, to make the point arising for decision clear. O. S. No. 243 was instituted by Palaniappa Mudali against Thayali Anni, the mother of the petitioner, for a declaration that a certain will, which she had presented for registration, was a forgery. The suit was originally instituted in the Sub-Court of Kumbakonam. That court, holding that it had no jurisdiction to entertain the suit, returned the plaint for presentation to the proper court. Subsequently the plaint was presented in the Munsif's Court of Mayavaram. Thayali Anni died subsequently. After her death the plaintiff applied to the Munsif for permission to withdraw his suit, with leave to sue again, and permission was granted. The order giving permission was subsequently set aside by this court in Letters Patent Appeal No. 146 of 1909 presented by the present petitioners, the

* C. R. P. No. 143 of 1911. 8th February, 1912.

sons of Thayali Anni. They had previously asked the Munsif to review his order granting leave to sue again but failed. This court, in setting aside the order granting leave, remitted the plaintiff's petition to withdraw his suit with leave to sue again, for fresh disposal. The District Munsif's Court, on rehearing, dismissed the plaintiff's petition and granted to the present petitioners their costs incurred previously in this court and also their costs incurred in the plaintiff's petition in the Munsif's Court. This revision petition relates to the refusal to award to the present petitioners the costs incurred by their mother in the Kumbakonam Sub-Court, before that court had returned the plaint. The Munsif holds that subsequent to the re-presentation of the plaint in the Mayavaram Court the suit abated on Thayali Anni's death; that no petition was put in by the plaintiff or by the present petitioners for the substitution of the petitioners' names on the record in the place of Thayali Anni; and that he had no power, in these circumstances, to award to the petitioners the costs incurred by Thayali Anni. The petitioner's contention before me is, that he was mistaken in supposing that he had no power to do so. I am of opinion that the District Munsif is right. If a suit abates on the ground that no representative of a deceased defendant is brought on record, there is, as far as I am aware, no provision entitling the representatives of the deceased defendant to come to court and ask for the costs of the suit. When the abatement of the suit is in consequence of the death of the plaintiff, there is provision made in the Code for ordering the costs of the defendant to be paid out of the estate of the deceased plaintiff. But there is no similar provision for directing the plaintiff to pay to the heirs of the deceased defendant the costs incurred by such deceased defendant, when the suit abates in consequence of his death. What remedy, if any, would be open to the heirs in such a case, does not arise for decision in this petition. It may be that they might be entitled to institute a suit for the purpose. At any rate, my attention is not drawn to any authority for holding that the court can award, in the suit which has abated, costs to the heirs of the deceased defendant against the plaintiff.

The order of the Munsif was therefore right, and I dismiss this petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis.

In the matter of Gulam Ali Shamsuddin Saheb, an Insolvent.

Insolvency Act (Presidency), S. 52—" Reputed Ownership "—Insolvent leaving the keys of the business premises with the creditor at night in non-business hours.

In re **Shamsuddin Saheb.**

Where the effect of the stipulation between the secured creditor and the insolvent was to make the mortgagee custodian of the keys out of business hours, and until the happening of the breach of the stipulation, the creditor had apparently no right to intermeddle with the goods even during those hours : *Held* :—(1) That the goods continued to be in the possession, order or disposition of the trader notwithstanding that the keys were taken every night to the secured creditor and taken from him every morning. (2) That, in any view, the goods were absolutely in the possession, order and disposition of the insolvent.

W. B. Barton instructed by *Grant and Greatorex* for the claimants.

Nugent Grant instructed by *Wilson* for the Official Assignee and the opposing creditors.

The Court delivered the following

JUDGMENT :—In these two connected cases the Official Assignee has rejected the claims of the petitioners to be entitled to rank as secured creditors against the sale-proceeds of the stock-in-trade of the insolvent which was in his possession and which, after the insolvent had absconded, they took possession of and directed to be sold by the Madras Sales Agency. The sale-proceeds were claimed and recovered by the Official Assignee and subsequently, as I have said, he refused to admit the petitioners' claim to rank as secured creditors and these two notices of motion, though they do not so state expressly, must be regarded as appeals from the decision of the Official Assignee.

They—one of them at any rate—raise a question of very considerable importance. Hinduji Jeetaji, the first petitioner, made various advances to the insolvent and obtained promissory notes and, what I may call, letters of hypothecation in which one term was " we agree to deliver to you the keys of the said business premises and to take from you every morning the said keys and return them to you every evening. For breach of any stipulation contained herein or failure to pay the money due when

* I. P. No. 5 of 1911. 20th March 1911.

In re Shamsuddin Saheb.

demanded it shall be lawful for you without my consent to retain the keys and seize the goods or otherwise take possession of them." The effect of these provisions really is to make the mortgagee custodian of the keys out of business hours, and until the happening of the breach referred to, he has apparently no right to intermeddle with the goods even during these hours. There is evidence that that agreement was carried out, and the important question arises whether under this arrangement "the stock-in-trade was left in the possession or order or disposition of the insolvent in his trade or business by the consent and permission of the true owner under such circumstances that he was the reputed owner thereof"—this is the language of S. 52 of the Presidency Towns Insolvency Act—and whether this state of things existed at the commencement of the insolvency, the commencement of the insolvency being the date of the first act of bankruptcy according to another section.

Now I think it may be said at once that this provision is a product of local ingenuity. From the time of James I down to the present day during which these provisions have been in force, no one, so far as can be ascertained, has ever yet thought that it was enough to defeat the provisions of the Act that every day when the trader locks up his shop and leaves it and goes to his place of residence, instead of keeping the keys under his own pillow for the night, he should hand them over to the mortgagee and take them back again in the morning. Such a proceeding is one of which the people trading with the insolvent would be absolutely unaware, so that in the view of everybody the goods would be at the order and disposition of the insolvent and he would be the reputed owner thereof.

If this is enough to take the case out of the section, the latter will become very largely a dead letter. As we know, all traders have a very natural objection to its being known that they have had to pledge their stock-in-trade, because it affects their credit. If it be enough to secretly hand over the keys every night in some other part of the town and get them back next morning to prevent the goods from being in the possession, order and disposition of the trader, one can scarcely doubt that this method will be very widely adopted and the object of the legislature defeated. However, if that is the law, I am bound to give effect

In re Shamsuddin Saheb.

to it, but I am of opinion that it is not the law. I am of opinion that under this agreement, these goods continued to be in the possession, order or disposition of the trader, notwithstanding that the keys were taken every night to the secured creditor in another part of the town and were taken from him every morning. A case was cited from I. L. R. 11 C. 451 in which an insolvent obtained an advance and the lender insisted that the stock-in-trade should be given as security and that the key of the godown in which the goods were stored should be delivered to him at once. I think it was the next day the insolvency happened, and it was held that by getting possession of the key the lender had got possession of the goods and that he did all that he could do and that the goods had ceased to be in the possession, order or disposition of the insolvent. But that was, in my opinion, a very different case from this, in which the only right the lender reserved to himself was a right of keeping the keys at night when the premises were shut up and he had not even then any right to intermeddle with the stock until the happening of a breach. In my opinion any possession which the lender had under that arrangement was not a real but a sham possession, and that, as I understand it, is the test. In the case of *Exparte National Guardian Assurance Co.* : *In-re Francis*[1] that is the test which is laid down. Discussing the evidence in that case Lord Justice *James* said : "It was not a sham but a real possession, taken for the purpose of giving effect to the security of the company." And Lord Justice *Thessiger* also said, at page 415, that it was necessary to arrive at a conclusion whether the possession was a real one or a mere sham. If, as held in the circumstances of that case, the possession of the true owner was a real one, the case is at once taken out of the section, but I am prepared to hold that in this case the possession was a mere sham. Further, I find in the case of *Exparte Cohen* : *In re Sparke*[2] it is said, of the agreement proved in that case, by Lord Justice *James* : "The agreement was evidently concocted for the purpose of evading, if possible, the remedy which the Act, as to bills of sale, intended to provide for the benefit of the creditors. This attempt at fraud does not, in my opinion, strengthen the position of those who rely upon it to support the assignment. To hold that such an assignment could stand would be a direct encouragement to fraud." Lord

1. (1878) 10 Ch. D. 408. 2. (1871) 7. Ch. Ap. 20

In re Shamsuddin Saheb.

Justice *Mellish* says: "It is a device between them for the benefit of the debtor, to enable him to avoid that registration which the Act of Parliament has required." Similarly in this case, I should be prepared to hold that a device of this sort, under which the debtor was in effect really left in the enjoyment of an effective control of the goods, was simply a device to effect fraud upon the Act, such as spoken of here. A deliberate arrangement such as this to deceive the public differs, in my opinion, entirely from such a case as *Hilton* v. *Tucker*.[1]

Further, whether I am right in the view I have taken or not, there cannot be the least doubt that, under this agreement, during the working hours of the day those goods were absolutely in the possession, order and disposition of the insolvent. He got the keys in the morning and he returned them late at night, and under the circumstances I hold that they were during the daytime in his absolute order, possession and disposition. Then under the Act the insolvency relates back to the act of bankruptcy, and on sending for the petition upon which the adjudication was made I found that the adjudication is made on an affidavit which alleges that "on or about the 13th of December, the said insolvent, with the object of secluding himself so as to deprive his creditors of the means of communicating with him, locked up the place of business and left Madras taking the keys thereof." And the evidence is that he left for Bombay on that night. Even assuming that before he left for Bombay he had handed the keys to these creditors, still the words of the Act are "with intent to defeat or delay his creditors he departs from his usual place of business or otherwise absents." It seems to me that he must have left his place of business on the night of the 13th with the intention of so starting for Bombay and that the act of bankruptcy must be considered as having taken place when he left his place of business on the evening of the 13th without any intention of returning, at a time when, in my judgment, the goods were in his possession, order or disposition with the consent of the true owner, that is to say the hypothecatees.

So much for the appeal in the first case of Jeetaji. With regard to the second appeal of Jeevaji the case is not even so

1. (1888) 39 Ch. D. 669.

strong because the letter of hypothecation in that case, which recites that the goods have been deposited with the creditor, says nothing whatever about this arrangement of handing over the keys every night and taking them again in the morning. The evidence is that there were two sets of keys, one set of which was handed to Jeetaji every night and the other to Jeevaji. Though these two professed to be absolute strangers to each other—they never heard of each other even—yet they combined in all the steps taken for realizing the goods, and the evidence of there being two sets of keys is of a very unsatisfactory character. I am not prepared to hold that it has been satisfactorily proved that Jeevaji had even the sort of possession which would have resulted to him from the keys being left in his house every night and taken away in the morning. It looks to me more as if this was an after-thought intended to bring him into line and to put him within as strong a position as Jeetaji. At any rate the onus is distinctly upon him to establish that the goods were in his possession and I hold he has failed to establish that by satisfactory evidence. The result is that both these appeals must be dismissed with costs.

In re Shamsuddin Saheb.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Philips.

Challapalli Hanumanulu Pantulu .. Appellant*
(*Plaintiff*)

v.

The Secretary of State for India in Council represented by the Collector of Kistna .. Respondent
(*Defendant*).

Land revenue—Freedom from liability to be assessed—Onus—Land Acquisition Act, S. 279—Effect of—Vesting of title to acquired land.

Where land is acquired by the Government for a Municipality under the Land Acquisition Act, the title vests in the Government to the land and the Municipality subsequently derives its title from the Government.

A person claiming to hold lands from the Government without liability to pay assessment must show some grant exempting him from the payment of the ordinary assessment.

No exemption can be claimed without a grant or exemption in express words.

Hanumanulu Pantulu *v.* The Secretary of State for India.

* S. A. No. 221 of 1910. 12th October 1911.

Hannumanulu Pantulu *v.* The Secretary of State for India.

Second appeal from the decree of the District Court of Kistna at Masulipatam in A. S. No. 157 of 1908 presented against the decree of the Court of the District Munsif of Bezwada in O. S. No. 324 of 1906.

T. Prakasam and *V. Ramadas* for appellant.

The Government Pleader for respondent.

The Court delivered the following

JUDGMENT:—The plaintiff's suit is for a declaration that the Government is not entitled to levy ground rent for certain land in his occupation and for the recovery of the amount collected from him by the Government as ground rent.

The District Judge has decided, and in our opinion, quite rightly, that the plaintiff has not made out any cause of action. Two points are argued in second appeal. The first is that the Municipality acquired, by the land acquisition proceedings, the inam right which belonged to the original owners of the land and that by successive sales the plaintiff now owns that right. The Government, it is contended, is entitled only to quit-rent as from the inamdar and not ground rent. Assuming that a civil court could go into this question, there is really no basis for the contention. The land was acquired by the Government for the requirements of the Bezwada Municipality under the Land Acquisition Act. It is quite clear that when the land was acquired, the title to it vested in Government—see S. 16 of the Act. Section 279 of Madras Act IV of 1884 does not help the plaintiff at all. It provides that on payment by the Municipality of the amount of compensation awarded for the land, the land shall vest in the Municipality. It is quite clear from that section itself that it is the Government that is to acquire the land. The effect of the section is merely to declare that the title which vests in the Government by the acquisition passes to the Municipality when the Municipality pays the amount settled as compensation. The title of the Municipality, therefore, was derived from Government. When the land became vested in the Government it became ordinary Government land liable to assessment in the hands of any person who might afterwards become the occupier. If the plaintiff claims to hold

the land free from the payment of such assessment as the Government may fix, he must show some grant exempting him from the payment of the ordinary assessment. The appellant's counsel argues that it must be taken that there was such a grant in this case because, when G. O. No. 20 dated the 20th February 1889 was issued permitting Municipal Councils to transfer lands vested in them by sale, mortgage or otherwise, no condition was inserted that the assignee would be liable to pay such assessment or ground rent as might be fixed by the Revenue authorities, and that this condition was inserted only in an order passed in the year 1900. The argument is that, under the previous order of 1889, every transferee from the Municipality would acquire an absolute right to the property transferred free from the payment of any assessment; in other words, that order granted an exemption for payment of land revenue to all persons who might purchase lands from the Municipality. This is a contention which it is impossible to uphold. There are no words of exemption from liability to assessment in the Government Order of 1889. No exemption can be claimed without a grant or exemption in express words. The construction to be placed on the order of 1889 would be that the transferees would obtain a title to the land under their transfers although the transferor might be a Municipal Council, *i. e.*, to remove all the objection to the transfer on the ground that the transferor is a Municipal Council. There is no reason for differing from the conclusion of the lower appellate court. We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Sundara Aiyar.

Unde Rajaha Raja Sir Raja Velugoti Sri Raja Gopalakristna Yachendra Bahadur Varu, K.C.I.E., Panchahazar Munsabdar, Rajah of Venkatagiri .. Petitioner* (*Plaintiff*)

v.

Vemuru Chinta Reddi and others .. Respondents (*Defendants*).

Contract Act, S. 25—Agreement controlling the procedure of court in deciding a suit—Agreement to have a question decided according to the decision of another court in another case.

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* C. R. P. No. 740 of 1910. 8th February, 1912.

Rajah of Venkatagiri v. Chinta Reddi.

An agreement by the parties to a suit that they would abide by the decree of another court in another case as regards the question raised in the first case will not deprive the plaintiff of his right to have the first suit decided on the merits.

The ordinary rule is that, when the court is 'seized' of a case, it has jurisdiction to decide it in the manner prescribed by law, and parties have no right to interfere with its authority to do so. There are, no doubt, well understood exceptions to the rule, but where the exceptions do not apply the rule must prevail. The dispute may be settled by any lawful agreement, the court may refer the question to an arbitrator, or the parties may enter into an agreement making the oath of one of them conclusive of all or any of the facts in issue. But the parties cannot agree to control the court in its decision of the suit in a manner different from that prescribed by law.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the District Court of Nellore in S.C. S. No. 97 of 1907.

S. Subramania Aiyar for petitioner.

S. Swaminathan for respondents.

The Court delivered the following

JUDGMENT:—This is an application by the plaintiff in S. C. S. 97 of 1907 in the District Court of Nellore to revise the judgment of the District Judge. The suit is to recover from the defendants a sum of Rs. 349-8-0 on a pronote executed by them in favour of the plaintiff in 1906. The defendants pleaded that there was no consideration for the note; that they had instituted a suit O. S. No. 281 of 1907 in the District Munsif's Court of Nellore for the cancellation of the note, and that the suit was therefore not maintainable. It appears from the B Form Diary that the suit was adjourned pending the decision of the Munsif in O. S. 281 of 1907, and that, after the Munsif's decision of the suit declaring the pronote not enforceable against the defendant this suit was dismissed. The judgment of the District Judge states: "Both parties represented in this court that they would abide by the decree of the District Munsif of Nellore in O. S. 281 of 1907 on his file in regard to the question raised in this case." The question referred to in this sentence seems to be whether the pronote was unenforceable on the ground that it was not supported by any consideration. Unfortunately, there is no written record of the representation by the parties except what appears in the judgment. Nor are the

parties agreed as to what exactly the representation was. The plaintiff says that the agreement between the parties was that the question in dispute should be decided in accordance with the final judgment of the matter in O. S. 281 of 1907 on the file of the District Munsif of Nellore, which was capable of being carried up on appeal to the District Court and finally to this court. The defendants, on the other hand, contended that the decision of the District Munsif in O. S. 281 of 1907 was to be accepted as binding between the parties in the Small Cause Court. In the view we take of the case, we think it unnecessary to decide which of these statements is correct. It may be noted that the decision of the Munsif in O. S. 281 of 1907 was reversed by the District Court on appeal and the pronote was held to be binding on the defendants; and the second appeal against the District Judge's judgment was dismissed by this court.

Rajah of Venkatagiri *v.* Chinta Reddi.

The question argued in this revision petition at the hearing was,—assuming that the plaintiff had originally represented that the case might be decided in accordance with the decision of the Munsif in O.S. 281 of 1907, whether he thereby disentitled himself to ask subsequently that it should be decided by the District Judge on the merits. We are not at present concerned with the question of what legal effect, apart from any agreement between the parties, the judgment of the Munsif in O. S. 281 of 1907 or the final appellate judgment in that case would have upon the controversy in the small cause suit. We have come to the conclusion that the defendants were not entitled to insist on the representation originally made by the parties as a bar to the plaintiff's right to the trial of the small cause suit. The agreement in question cannot be regarded as an adjustment of the subject-matter of the suit by a lawful agreement or compromise. The agreement did not settle the dispute but postponed the settlement and purported to authorise the court to settle it in a certain manner. A compromise has been defined as "a mutual agreement between two or more persons at difference, to put an end to such difference, upon certain terms agreed upon." (Burrill's Dict. quoted in 8 American Cyclopaedia of Law and Procedure, p. 501). It must be an agreement which one of the parties can insist on the court enforcing against the will of the other. Can it be said in this case that one of the parties could insist on the

Rajah of Venkatagiri *v.* Chinta Reddi.

court postponing the small cause suit till the District Munsif's decision in O. S. 281 of 1907? We think not. The ordinary rule is that, when the court is 'seized' of a case, it has jurisdiction to decide it in the manner prescribed by law, and that parties have no right to interfere with its authority to do so. There are, no doubt, well understood exceptions to this rule, but where the exceptions do not apply, the rule must prevail. Notwithstanding the pendency of a suit, the parties may settle their disputes as they like by any lawful arrangement, and the court is then bound to give effect to the settlement. Again, they may ask the court to refer the questions in dispute to an arbitrator, in which case though the decision of the cause is primarily transferred to another tribunal, the court will retain some control over the proceedings. The parties may also enter into an agreement making the oath of one of them conclusive evidence of all or any of the facts in issue between them. This again is subject to the control of the court.

The present case does not fall within any of these exceptions. Our attention is not drawn to any rule or principle which would compel a party to adhere to any agreement by him that the suit may be decided in a manner different from that prescribed by law. For instance, we do not think that if a litigant agreed that the Judge might decide the suit in the manner that a certain individual might advise, such an agreement would bind him. In *Rukhmanbai v. Adamji*[1] BEAMAN J. held that an agreement that certain disputes relating to the accounts between the parties in the case should be decided by the Assistant Commissioner in a summary manner without going into formal evidence beyond the accounts, objections and surcharges filed before him, was not binding. The learned Judge observes that it did not amount to an adjustment or compromise and that the agreement not being in writing would not constitute a binding reference to arbitration. He elaborately discusses the question whether an agreement to refer to arbitration and to be bound by the award passed by an arbitrator can be treated as amounting to a compromise and expresses disinclination to accept as sound the decisions cited before him in support of the position that such

1. (1908) I.L.R. 33 Bom. 69.

an agreement would amount to an adjustment or compromise when an award had been passed by the arbitrator. We consider it unnecessary to express any opinion on this question, as it is clear that the agreement in the present case cannot be treated as a reference of the dispute in the small cause suit to the arbitration of the Munsif who was trying O. S. 281 of 1907. In *Moyan* v. *Pathukutti*[1] an agreement by the plaintiff to take a certain oath and to have his suit dismissed, if he failed to do so, was regarded as not binding on him. We hold that the agreement in question in this case did not deprive the plaintiff of his right to have the suit decided on the merits. We therefore reverse the decision of the Judge and remand the suit to the District Munsif of Nellore to be disposed of by him according to law, as a regular original suit. The costs of this petition will abide the result.

Rajah of Venkatagiri *v.* Chinta Reddi.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Spencer

Sri Raja Satrucherla Veerabhadra Raju Garu, *alias* Sivaskanda Raju Bahadur Garu, and another .. .. .. Appellants* (*Plff.'s Legal Representatives*)

v.

Ganta Kumari Naidu and others .. Respondents (*Defendants*).

Madras Act VIII of 1865, S. 7—Patta, tender necessary — Madras Estates Land Act, S. 53—Suit after Estates Land Act for rent accrued due before the Act.

Veerabhadra Raju *v.* Kumari Naidu.

Under Act VIII of 1865 (Madras) the tender of a patta is only a statutory pre-requisite to enable the landlord to take legal proceedings against his tenant and not a condition necessary to complete his right to the rent: and as that statutory pre-requisite necessary to enable the landlord even to sue for rent has been taken away by the Estates Land Act, a suit for rent accrued due before the latter Act came into force is maintainable after the coming into operation of the Act without a tender of patta.

Second appeal from the decree of the District Court of Vizagapatam in A. S. No. 159 of 1909, presented against the

* S. A. No. 1391 of 1910. 2nd January 1912.

1. (1907) I.L.R. 31 M. 1.

Veerabhadra Raju v. Kumari Naidu.

decision of the Court of the Sub-Collector at Parvatipur Division in E. S. No. 34 of 1908.

V. Ramesam for appellants.

P. Narayanamurthi for respondents.

The Court delivered the following

JUDGMENT:—In this case the plaintiff, a land-holder, instituted a suit for rent of faslis 1315 to 1317 and of a portion of fasli 1318. The Sub-Collector passed a decree in the plaintiff's favour which was reversed by the District Court, so far as the rent for faslis 1315 to 1317 was concerned, on the ground that the plaintiff did not tender a patta to the defendant for those faslis, and the suit for rent for those faslis was therefore unsustainable under the provisions of S. 7 of the Rent Recovery Act VIII of 1865. That section provided that "no suit brought and no legal proceedings taken to enforce the terms of a tenancy shall be sustainable unless pattas and muchilikas have been exchanged as aforesaid." The effect of the section was to make the tender of a patta a condition precedent to entitle a landlord to institute legal proceedings to enforce the terms of a tenancy. It did not make the exchange of pattas and muchilikas or the tender of a patta necessary to give the landlord a right to the rent of the land in the tenant's possession. That right was complete when the tenant obtained from the land his landlord's share of the produce. It was held, while Act VIII of 1865 was in force, in cases where rent was payable by instalments, that the right to each instalment of rent accrued on the date fixed for the instalment and that limitation would run from that date. The District Judge observes:—"If the terms of Section 7 of the Rent Recovery Act were not complied with, within the fasli, suits brought to recover arrears of rent were barred by time. This suit, for arrears of rent for faslis 1314 to 317, was barred by time under the Rent Recovery Act as no pattas admittedly were tendered within any of those faslis."

We cannot agree with the Judge that S. 7 laid down any rule of limitation. The limitation for a suit for rent is three years from the time when it accrues due; and it accrues due when it is payable according to the contract between the parties or according to usage, and not when a patta

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is tendered. The tender of a patta is only a statutory pre-requisite to entitle the landlord to take legal proceedings against his tenant and not a condition necessary to complete his right to the rent. This condition has now been dispensed with by the Estates Land Act. Section 53 of that Act makes the tender of a patta necessary only when the landlord wishes to distrain and sell the tenant's moveable property or to bring the holding to sale. The result is, the landlord is now liberated from the necessity of doing an act which was necessary when the old Act was in force. The plaintiff is therefore entitled to maintain his suit for rent of faslis 1315 to 1317 without tendering a patta.

We must therefore allow the appeal and award to the plaintiff rent for faslis 1315 to 1317, also to the extent claimed in the appeal.

The District Judge allowed interest at 6 per cent. per annum. This modification will stand as it has not been disputed by the appellant. The parties will pay and receive proportionate costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Abdur Rahim and Mr. Justice Sadasiva Aiyar.

The Public Prosecutor .. Appellant*

v.

Bala Nagi Reddi and others .. Accused.

The Public Prosecutor v. Bala Nagi Reddi.

Evidence—Proof—Statement by dying person—Methods of proof.

Where the verbal statement of a dying person is sought to be proved, the proper and legal mode of proving it is by eliciting from the person who heard the deceased make the statement what the deceased said.

If the statement was taken down in writing by the witness or by some one in the presence of the witness, the witness would be entitled to refresh his memory, if he so wanted, by referring to such writing; otherwise the writing itself is not relevant unless it is in the nature of a deposition taken in the presence of the accused. Where the deceased dictated his statement and it was taken down and he then signed the writing after being satisfied as to its accuracy, such writing may be regarded as a statement by the deceased in writing and would be admissible under S. 32 of the Evidence Act; and even then it would not bar a witness who heard the statement

* Cr. A. No. 540 of 1911. 19th February 1912.

The Public Prosecutor *v.* Bala Nagi Reddi.

from proving it independently of the writing; and ordinarily, it would be desirable to have on record what the witness is able to reproduce from memory what he heard the deceased state in addition to the writing in which the statement was taken down.

Appeal under S. 417 of the Criminal Procedure Code against the judgment of acquittal passed on the accused in the Sessions Case No. 11 of 1911 by the Sessions Judge of Cuddapah.

C. Sidney Smith, for *Public Prosecutor*, for appellant.

L. A. Govindaraghava Aiyar, *T. Ananthachari* and *E. R. Osborne* for accused.

The Court delivered the following

JUDGMENT:—In this case the six accused persons were tried by the Sessions Judge of Cuddapah with the aid of assessors. The first accused was charged under Ss. 302 and 109 of the Indian Penal Code, and the remaining five accused were charged under S. 302, with reference to the death of one Kristna Reddi. The assessors found all the accused not guilty of the offences charged against them, and the Sessions judge, agreeing with them, has acquitted them. This appeal has been preferred by the Government against the order of acquittal. As against the 1st accused there is practically no evidence to connect him with the murder of Kristna Reddi.

* * * *

We must therefore hold that the acquittal of the 1st accused is right and the appeal against him will be dismissed.

As regards the case of the other accused, we have come to the conclusion that they must be retried. To begin with, the manner in which the learned Sessions Judge has recorded evidence in this case cannot be said to be satisfactory. Besides the evidence of Prosecution Witness No. 1 the alleged eye witness of the occurrence and of Prosecution Witness No. 2 who is said to have seen accused Nos. 2 to 6 run away immediately after the assault, the most important evidence against these accused consists of the dying declarations of the deceased. It was sought to prove the dying declarations by the evidence of men who heard the deceased making the statements and were in a position to state what they heard and by proving the document in which the statement was taken down and signed by

the deceased. Now Prosecution Witness No. 5 is one of the witnesses who deposes to what the deceased stated. His deposition on this point is recorded thus :—

"I asked him (meaning the deceased) and he said that the five accused beat him." The witness could not have used the words 'the five accused' as what he heard the deceased utter; not only the deceased's assailants were not accused at the time of assault, but the persons under trial were six in number and this witness's evidence as recorded does not indicate which five of the six accused the deceased said had assaulted him. Similarly the 2nd Prosecution Witness's evidence as to the dying declaration made by the deceased is recorded in this way. "He said accused Nos. 2 to 6 beat him and wept." It is of the utmost importance that evidence as to the dying declaration should be as exact and full as possible. We should have on record everything which a witness heard the deceased say, as to the transaction which resulted in his death. The dying statement of the deceased as heard by the witnesses who speak to it was apparently, if one is to judge from Exhibit A, much fuller than what the record of their depositions would show and it seems that the Sessions Judge has not recorded all that they said on the point.

Further we would point out that, when what is sought to be proved is the verbal statement of a dying person, the proper and legal mode of proving it is by eliciting from the person who heard the deceased make the statement, what the deceased said. If the statement was taken down in writing by the witness or by some one in the presence of the witness, the witness would be entitled to refresh his memory, if he so wanted, by referring to such writing ; otherwise the writing itself is not relevant unless it is in the nature of a deposition taken in the presence of the accused. Where the deceased dictated his statement and it was taken down and he then signed the writing after being satisfied as to its accuracy, such writing may be regarded as a statement by the deceased in writing, and would be admissible under S. 32 of the Indian Evidence Act. Exhibit A in this case would stand on this footing. But even if what was stated was taken down by some one in writing and signed by the deceased, that would not debar a witness who heard the

The Public Prosecutor v. Bala Nagi Reddi.

statement from proving it independently of the writing. And ordinarily it would be desirable to have on record what the witness is able to reproduce from memory as what he heard the deceased state in addition to the writing in which the statement was taken down.

Further it appears that accused Nos. 2 to 6, who examined witnesses in support of their defence before the Committing Magistrate did not examine any witnesses for the defence in the Sessions Court.

Mr. Osborne, the learned counsel who appears for them in support of the order of acquittal, states that the learned Sessions Judge at a very early stage of the case, either after the examination of the 1st or 2nd prosecution witness expressed a decided opinion that if that was all the important evidence in the case besides the dying declaration of the deceased, the case for the prosecution was not a strong one. Mr. Osborne says that he was led by that expression of opinion by the Sessions Judge to refrain from examining defence witnesses. We have no reason to doubt that that is probably what occurred in this connection. In these circumstances we set aside the acquittal and order a retrial of the case against accused Nos. 2 to 6.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sundara Aiyar.

Kulondavalu Padayachi .. Petitioner* (*Plaintiff*)

v.

Kamatchi Ayyar .. Respondent (*Defendant*).

Contract—Suit against third party, beneficiary, for breach of condition in contract—Right of suit.

Kulondavalu Padayachi v. Kamatchi Aiyar.

A person who takes a benefit under a contract between two others, is bound by the conditions under which he takes the benefit, even though he is a stranger to it; and is consequently liable to be sued in respect of the condition.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the District Munsif's Court of Mayavaram in S. C. S. 484 of 1910.

T. V. Muthukrishna Aiyar for appellant.

T. R. Venkatrama Sastry for respondent.

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* C. R. P. No. 42 of 1911. 8th February 1912.

The Court delivered the following

Kulondavalu Padayachi v. Kamatchi Aiyar.

JUDGMENT :—I am unable to sustain the decision of the District Munsif in this case. The plaintiff sued to recover monies paid by him on account of kist of certain land in the possession of the defendant, which, he alleged, the defendant was bound to pay to him. The plaintiff's case was really based on a contract. By a partition agreement between him and his brother it was provided that the defendant should enjoy certain land for her maintenance and pay the kist due on it to the plaintiff and his brother, Rs. 8 to each of them. The District Munsif dismissed the suit on the ground that the plaintiff could claim no relief on the basis of the partition deed because the defendant was not a party to it. But it was under the partition deed that she got her right to hold the land. Though not a party to the contract she was one who took a benefit under it, subject to the burdens placed on her by that document. She was therefore bound to pay the kist to the plaintiff and his brother as provided therein. In fact she got possession of the land by means of a suit based on the partition deed.

The District Munsif has not disposed of the other contentions which the defendant raised. His decree must therefore be reversed and the suit remanded for fresh disposal on the other questions raised by the defendant. The costs of this petition will abide the result.

IN THE JUDICAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT ALLAHABAD.]

Present :—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Kunwar Ragho Prasad and others .. Appellants*

v.

Lala Mewa Lal and another .. Respondents.

Ragho Prasad v. Mewa Lal.

C. P. C., O. XXXIII, r. 10 (*S.* 411)—"*First charge on the property*"—*Costs in suits in forma pauperis—Crown prerogative—Meaning and limits of.*

A mortgagee obtained a decree for sale on his mortgage on a certain date; but before the sale, the wife of the mortgagor brought a suit *in forma*

* 23rd January 1912.

Ragho Prasad v. Mewa Lal.

pauperis against the mortgagor for dower on the allegation that the same was charged on the mortgaged property. The suit was decreed with costs against the mortgagor but dismissed with costs against the mortgagees and the amount of the court-fees was ordered to be a first charge on the amount decreed to the wife and the defendant, her husband, was also made responsible for it. The Government sold the mortgaged property in execution of the order in respect of the court-fee amount due to them.

Held: that the decree in the pauper suit did not create or purport to create any charge on the mortgaged property in favour of the Government.

It is only when claims of the Crown and claims of "common persons" concur or come into competition that the Crown is preferred. The Crown has no more right than a "common person" to seize *A*'s property (a mortgagee's property) and apply it in, or towards the discharge of a debt due from *B* (the mortgagor in respect of the court-fee due to Government in a different suit).

Appeal from a decree of the High Court at Allahabad (December 2, 1908) affirming a decree of the Court of Small Causes at Allahabad, exercising the powers of a Subordinate Judge (September 19, 1906).

Ross and *Kenworthy Brown* for appellant.

De Gruthyer K. C. and *A. P. Sen* for *Dube* for respondents.

Their Lordships' judgment was delivered by

Lord Macnaghten:—This an appeal from a decree of the High Court at Allahabad, which affirmed a decree of the Court of Small Causes exercising the powers of a Subordinate Judge.

The suit was brought by the respondents Mewa Lal and Lachmin Narain to recover property which they had been deprived of through the intervention of a Government official who attached it and got it sold in order to satisfy a debt due to Government from somebody else.

The facts are undisputed.

On the 17th of December 1895, the respondents, who were mortgagees of shares in seven villages belonging to their mortgagor, one Tufail Ali Khan, obtained the usual decree for sale. The 17th of April 1896 was the date fixed for payment of principal, interest and costs which amounted in all to Rs. 19,290-9-6. The mortgagor made default. On the 23rd of April 1896, the mortgagees applied for an order absolute. The order was drawn up on the 16th of May following. On the 24th of March 1897 an

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application was made for execution of the decree by sale of the mortgaged property, and on the 26th of April 1897 the execution case was transferred to the Collector's Court as the property was ancestral. The decree came into the hands of the Sale officer on the 8th of July 1897.

In the meantime, the wife of the mortgagor brought a suit *in forma pauperis* against her husband, Tufail Ali Khan, and the respondents, claiming from her husband a lakh of rupees under a contract of dower, and alleging that that sum was charged on the mortgaged property in priority to the mortgages, the subject of the decree of the 17th of December 1895. On the 11th of May 1897 the suit was decreed with costs against Tufail Ali Khan, but dismissed with costs as against his mortgagees, and it was ordered that the amount of Court fees which would have been paid by the plaintiff had she not been allowed to sue as pauper should be the first charge on the amount decreed to the plaintiff, and should also be recoverable from the defendant Tufail Ali Khan.

The order as regards the Court fees payable to Government was in accordance with the directions of S. 411 of the Civil Procedure Code, 1882, as to pauper suits.

That section is in the following terms :—

"411. If the plaintiff succeed in the suit, the Court shall calculate the "amount of the Court fees which would have been paid by the plaintiff if "he had not been permitted to sue as a pauper; and such amount shall be a "first charge on the subject-matter of the suit, and shall also be recoverable "by the Government from any party ordered by the decree to pay the same, "in the same manner as costs of suit are recoverable under this Code."

There was an appeal to the High Court but it was dismissed with costs.

So the respondents succeeded in preserving the priority of their encumbrances and in maintaining the decree of the 17th of December 1895. With this success all their troubles began. The Collector, on behalf of Government, applied for and obtained execution of the decree of the 11th of May 1897 not against Tufail Ali Khan against whom the suit was decreed, but against the mortgaged property, in regard to which the suit failed. That execution case was also sent to the Collector's Court.

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It was received by the Sale officer on the 18th of February 1898, more than six months after the receipt of the decree of the 17th of December 1895. However the Sale officer fixed one and the same day, the 22nd of July 1899, for sale in both cases. And when the day of sale came he put the property up for sale under the decree of the 11th of May 1897, and it was sold to Rai Bahadur, the father of the appellants, for Rs. 1,529, an amount just sufficient to satisfy the claim of the Government. The mortgagees' decree was returned to the civil court with a statement that no property was left for sale in connection with that decree. In taking this course the Sale officer, according to the opinion of the Collector, acted legally. Possibly, said the Collector, he might have put the property up for sale under the mortgagees' decree, "proclaiming at the same time the debt due to Government as an encumbrance to be satisfied by the purchaser," but there was no material irregularity. In the Collector's opinion the authorities clearly affirmed "the principle that the Govern-"ment takes precedence of all other creditors, whether or not "they have a lien on the property." At the instance of the mortgagees the civil court directed that the property should be put up for sale again under the decree of the 17th of December 1895. Ultimately the mortgagees bought it for Rs. 18,365. They obtained formal possession. But it seems that Rai Bahadur had already obtained possession under his sale certificate. Both parties then exerted themselves to collect rents. Then followed a struggle for mutation of names. The Assistant Collector dismissed an application for that purpose by the mortgagees, blaming them for trying to avoid payment of the Government dues "instead of quietly paying off" the Court fees and getting the property sold in satisfaction of their large debt. After a learned argument he held that the wording of S. 411, Civil Procedure Code, was clear that the Government dues were the first charge on the property, and that Rai Bahadur had consequently a preferential claim. Then the mortgagees appealed to the Collector. He took the same view, after argument, though he confessed that he "had not hitherto realised that the position of the Crown in such matters was so strong." Lastly, the mortgagees applied to the Commissioner on second appeal. He, too, rejected their application, in the first instance on reading the

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record, and then on an application for revision after hearing the parties at considerable length, who " argued as to the equity and legal rights of the case." As to the merits he pronounced no opinion. He thought it essentially a case for the civil court. But the added that, until the question was determined by a com. petent court, he did " not think that any fairer decision could be come to than that at which the Collector arrived."

So at last the mortgagees betook them to the civil court, to which they ought to have applied long before in a regular suit. The Judge of first Instance ordered that the respondents should be put in possession of the property and declared that they were the absolute owners. An appeal to the High Court was dismissed with costs. But the learned Judges, after argument, came to the conclusion that there was a substantial question of law involved, and gave leave to appeal to His Majesty in Council.

Their Lordships are at a loss to discover what question of law is involved in this case. So far as can be gathered from the judgments in the Collector's court, the validity of the sale to Rai Bahadur was rested on two grounds: (1) on the terms of S. 411 of the Civil Procedure Code and the decree of the 11th of May 1897, and (2) on the prerogative of the Crown. As to the first point, the claim put forward on behalf of the Government is absurd. The decree of the 11th of May 1897 did not create or purport to create any charge on the mortgaged property in favour of the Government. The Government had no right to attach the property and sell it in execution under that decree, though, of course, such interest, if any, as remained in the mortgagor from whom the Court fees were declared to be recoverable, might have been reached by a proper proceeding. The order for the first sale was, therefore, without jurisdiction. The sale passed no property to the person declared purchaser. On the second point the claim advanced by the Collector on behalf of the Government is a preposterous claim. It is only when claims of the Crown and claims of "common persons" (to use an old expression) "concur" or come into competition that the Crown is preferred. The Crown has no more right than a "common person" to seize *A*'s property and apply it in or towards the discharge of a debt due from *B*. That is not a question of law. It is a matter of common justice, and, it may be added, of common honesty.

Their Lordships will humbly advice His Majesty that the appeal ought to be dismissed with costs.

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Mangal Prasad Singh v. Mahadeo Prasad.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE NORTH WESTERN PROVINCES, ALLAHABAD.]

PRESENT:—*Lord Macnaghten, Lord Robson, Sir John Edge* and *Mr. Ameer Ali.*

Debi Mangal Prasad Singh ... ... *Appellant**

v.

Mahadeo Prasad Singh and others... ... *Respondents.*

Hindu Law—Stridhan—Inheritance—Mother's property taken on partition.

In the absence of any intention to the contrary expressed by the members effecting a partition, immoveable property taken by a Hindu widow on the partition of the joint family property under the Mitakshara Law, is not part of her stridhan in the narrow sense of the word, indicating her separate property or *peculium*, descendible to her own heirs on her death; but it stands in the same position in which property inherited by her stands and is descendible to her husband's heirs.

Sir Erle Richards K. C., and B. Dube for appellant.

De Gruyther, K. C; G. E. A. Ross, and *A. P. Sen* for respondent.

Appeal from a Judgment and Decree of the High Court of Judicature for the North Western Provinces at Allahabad, dated the 20th December 1909, which affirmed a Judgment and Decree, dated the 14th December 1907, of the Subordinate Judge of Gorakpur.

Their Lordships' Judgment was delivered by

Lord Robson:—The question to be determined in this case is whether immovable property, obtained by a Hindu widow on a partition of the joint family property under Mitakshara law, is part of her stridhan in the narrow sense of that word, indicating her separate property or *peculium* which passes on her death to her own heirs; or is merely part of her stridhan in the wider sense in which the word is sometimes used, as indicating any property in which she may have some right of proprietorship.

The property in question originally belonged to one Gaya Parshad, who, with his three sons, formed a Hindu joint family governed by the Mitakshara law. He died leaving three sons and a widow, Dulhan Sahibzad Kunwari. One of his sons, Sheo Partab

* 2nd February, 1912.

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Singh, died in 1889, leaving a widow and his son, the Plaintiff—Appellant. In 1894 a partition of the joint family property took place, at the suit of the Plaintiff, under the guardianship of his mother, and in that suit the Court apportioned one-fourth share of the family property to Dulhan Sahibzad Kunwari, who remained in possession thereof until her death on the 19th November 1900.

The plaintiff claims possession of one-third of the property thus held by her, on the ground that it passed, under the Mitakshara law, to the heirs of her husband, of whom he is one.

The first two Defendant-Respondents are the two surviving sons of Dulhan Sahibzad Kunwari, and their contention is that the property acquired by their mother on the said partition was her stridhan or *peculium* so as to descend to her heirs.

This raised the further question as to whether the Plaintiff, whose father had predeceased Dulhan Sahibzad Kunwari, was one of her heirs or was excluded from her inheritance by her surviving sons. The Subordinate Judge decided both these issues in favour of the Defendants, and the judgment was affirmed by the High Court at Allahabad.

The sections of the Mitakshara dealing with the property of a woman have given rise to much controversy and some conflict of decisions. In Chapter 2, section 11, para. 1, of that treatise, Vijnanesvara sets forth Yajnyawalcya's classification or description of woman's property as follows :—

> "What was given to a woman by the father, the mother, the husband, or "brother, or received by her at the nuptial fire, or presented to her on her "husband's marriage to another wife, as also any other (separate acquisition) is "denominated a woman's property."

In paragraph 2 of the same section, Vijnanesvara repeats in substance the six-fold classification given in paragraph 1, and then in place of general words "as also any other" he substitutes a further enumeration as follows:—

> "And also property which she may have acquired by inheritance, purchase "partition, seizure, or finding, are denominated by Manu and the rest, womans' "property."

This reference to Manu is not borne out by the quotation from that authority given in paragraph 4 (Section 11). Manu is there cited as making the same classification of the different kinds to 'woman's property" as that above given by Yajnyawalcya, and saying that they "are denominated the six-fold property of a woman."

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This six-fold enumeration of the sources of a "woman's property," as given by Yajnyawalcya and Manu, corresponds with the technical or narrow signification of stridhan indicating property which is under her absolute control during life and on her death is descendible to her heirs. Do the same characteristics attach to a woman's property derived from the additional sources specified by Vijnanesvara, viz., inheritance, partition, etc? These words "any other" with which Yajnyawalcya concluded his enumeration are a translation of the word "adi" or "adya." which according to Mr. Mayne (Hindu Law, 7th Ed., page 823) means "and the like." In that view, Yajnyawalcya meant to limit his description of "woman's property," or stridhan, to property acquired in any of the six modes he had just specified, or in any other manner *ejusdem generis* with those modes. Vijnanesvara's additional enumeration goes beyond that. When read with Yajnyawalcya's description, it constitutes a practically complete statement of the means by which a woman can acquire property rights. Dealing with this extended signification of the term "woman's property" Vignanesvara says in paragraph 3 of the same Section that it "conforms in its import with its etymology and is not technical." In paragraphs 2, 3 and 4, therefore, he is speaking of Stridhan in the wider sense. In paragraphs 5, 6 and 7, Vijnanesvara cites the description of "woman's property" given by Katyayana, which does not expressly profess to be exhaustive, but which closely approximates in character to that given by Yajnyawalcya and Manu, and does not include any of the heads (inheritânce, partition, etc.) added to the list by Vijnanesvara in paragraph 2. Then comes paragraph 8, which gives rise to the difficulty. It runs thus:—

"A woman's property has been thus described. The author next propounds the distribution of it. Her kinsmen take it if "she die without issue."

The rule of devolution prescribed by the author (Yajnyawalcya), to whom Vijnanesvara refers, was, so far as that author himself was concerned, no doubt intended to apply only to stridhan in the narrow signification defined in paragraph 1, and not to the enumeration as expanded by the commentator in the concluding words of paragraph 2. It is, indeed, possible to read paragraph 8 as applying only to the more limited enumeration of Yajnyawalcya. When Vijnanesvara says "a woman's property" has "been thus described," he may have been referring to the description given by his author and by Katyayana, and have intended to confine Yajnyawalcya's classification.

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His language, however, in paragraph 8, when read with what he says in paragraphs 2, 3 and 4, is open to the meaning that a woman's property, of whatsoever kind, descends always to her own heirs. It is difficult to adopt the latter construction in view of the undoubted fact that, as Sir Arthur Wilson said in delivering the judgment of their Lordships' Board in *Sheo Shankar Lal* v. *Debi Sahai*[1] "Most of the old commentators recognise, with regard to the property of a woman, whether called stridhan or by any other name, that there may be room for differences in its line of descent according to the mode of its acquisition."

So far as a woman's acquisition of property by inheritance is concerned the matter is now clearly concluded by the authority, and a consideration of the cases decided with regard to that item in Vijnanesvara's additional enumeration will facilitate the task of dealing with the item of "partition" in the same enumeration.

In the case of *Mussamat Thakoor Deyhee* v *Rai Baluk Ram and others*[2] it was contended that, in the provinces governed by the Mitakshara, the widow's estate in her husband's property was absolute, and that she had full power to dispose of it. In support of that argument reliance was placed on the concluding words of the second paragraph of Section 11, Chapter 2 of the Mitakshara above dealt with, Viz., "also property which she may have acquired by inheritance." Their Lordships, however rejected the view that those words included such property as a part of a woman's stridhan so as to make it descendible to her heirs. They quoted, with approval, the proposition laid by Sir William Macnaghten in his "Principles and Precedents of Hindu Law." Vol. 1 page 38, where he says:—

It was therefore held that a widow has no power of alienating any immovable property which she has inherited from her husband, and that, on her death, such property will pass to the next heirs of her deceased husband. Similarly, in *Bhugwandeen Doobey* v *Myna Baee*[3] it was held that, by the Hindu Law prevailing in Benares (the Western School), no part of the husband's estate, movable or immovable, forms portion of his widow's stridhan, and she has no power to alienate the estate inherited from her husband, to the prejudice of his heirs, which, at her death devolves on them. Sir James Colville, in delivering the judgment of their Lordships' Board, says. "Both the Vivada Chintamani and the Mayukha confine stridhan within the definitions of Manu and

1. (1903) I.L.R. 25 A. 468 (P.C.) 2. (1866) 11 M.I.A. 139.
3. (1867) 11 M.I.A. 487.

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Katyayana. They exclude property inherited, and the other acquisitions which are comprehended in the last clause of the paragraph in the Mitakshara, but are excluded by Sir William Macnaghten."

This observation puts partition on the same footing as inheritance, so far as the rights of a widow are concerned.

In *Chootay Lall* v *Chunni Lall and others*[1] it was held that, under the law of the Mitakshara, a daughter's estate inherited from the father is a limited and restricted estate only and not stridhan, so that upon her death the next heirs of the father succeed thereto.

The cases on the question of a woman's inherited property came under review by their Lordships' Board in *Sheo Shankar Lal and others* v *Debi Sahai*[2] before referred to and *Lal Sheo Pertab Bahadur Singh* v *Allahabad Bank, Limited and another*[3]. The construction of the Mitakshara was again considered, and it was held that, under the Hindu Law of the Benares School, property which a woman has taken by inheritance from a female is not her stridhan in such sense that her death it passes to her stridhan heirs in the female line to the exclusion of males.

Each of these authorities is inconsistent with the wide scope which the respondents, on their construction of the Mitakshara seek to give to the definition of stridhan.

The question now arises whether there is any substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition. It is a question attended with some difficulties, especially in the construction of the Mitakshara, whatever view of it may be taken. While a family remains joint a woman has no right under the Mitakshara to a specific share of the family estate.

She is only entitled to maintenance, or in due course to her customary inheritance, and if a partition takes place a mother gets a share equal to that of a son. If the share given to a widow on partition is given to her as a substitute for that to which she would be entitled upon inheritance; then, according to the foregoing authorities, it would seem reasonable that it should follow the same rule of descent and revert on her death to her husband's heirs. If, on the other hand, it is given to her by way of provision for her maintenance, it seems equally reasonable that when the necessity for her maintenance has ceased the property should revert to the

1. (1878) I.L.R. 4 C. 744 (P.C.) 2. (1903) I.L.R. 25 A. 468 (P.C.)
3. (1903) I.L.R. 25 A. 476 (P.C.)

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estate from which it was taken. Of course, the members of a joint family effecting a partition may agree that a portion of the property shall be transferred to the widow by way of absolute gift, as part of her stridhan so as to constitute a provision for her stridhan heirs; but, in the absence of any such intention, their Lordships do not feel justified in putting property acquired by a widow, on a partition of the joint estate, upon a footing different from that on which property coming to her by way of interitance has been placed. The contrary view was taken by the High Court at Allahabad in *Chhiddu* v *Naubat*[1] The learned Judges in that case laid great stress upon Chapter 1, Section VI paragraph 2, of the Mitakshara. Vijnanesvara there deals with the rights of a son born after the partition, and says that on the demise of his parents he obtains both their portions, :—

"His mother's portion, however, only if there be no daughter, for it is "declared that 'Daughters share the residue on their mother's property after "payment of her debts,"

Again Chapter 1., Section III, paragraph 8, runs as follows:—

"It has been declared that sons may partition the effects after the death of "their father and mother. The author states an exception in regard to the "mother's separate property: 'The daughters share the residue of their "mother's property, after payment of her debts."

This paragraph refers only to the mother's separate property or *peculium* whatever that may be. But it is by no means certain that either in that paragraph or in Section VI., paragraph 2, the property coming to her by way of partition is necessarily included in that *peculium*.

That there is a distinction in the rules of descent between different kinds of a woman's property, according to the mode in which it has been acquired, is beyond question, but the Mitakshara does not always discriminate between these different kinds of property, and in the doubt that arises as to its precise intent and construction in reference to this point, the principle upon which the cases relating to inheritance have been decided appears to be a safe guide in dealing also with cases of partition.

In this view, it is unnecessary to discuss the second question as to whether the Plaintiff was entitled to share in his grandmother's estate as one of her heirs equally with his uncles.

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1. (1901) I. L. R. 24 A. 67.

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Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed; the decrees of the Courts below set aside with costs; and in lieu thereof a decree made in favour of the Appellant for the one third of the share with mesne profits which came to Dulhan Sahibzad Kunwari on partition and was held by her.

The respondents will pay the costs of the appeal.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Present:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Ibrahim Hussein Khan v. Ambika Pershad Singh

Syed Mahomed Ibrahim Hossein Khan and other } *Appellants*

v

Ambika Pershad Singh and others. *Respondents.*

C. P. C. O. 34 S. 1. (T. P. A. S. 85) Proviso—"Notice"—Presumption as to notice of existence of puisne mortgage—Mortgage suit—Effect of non-impleading—Non-impleaded parties' rights.—Mortgage—Suborgation—Intention—Presumption.—C. P. C. S. 11 Expl. IV—" Might and ought "—Mortgage suits—Rights of subsequent mortgagee unimpleaded in suit.

When a subsequent mortgagee who had discharged a mortgage prior in date to the suit mortgage fails to put forth his claims in the suit S. 13 Expl 2. is a bar to a subsequent suit by him to enforce his rights.

Whether a mortgage paid off is extingnished or kept alive depends upon the intention of the parties *Mohesh Lal v Mohunt Bavan Das*[1] ref. to. The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interests *Gokuldas' case*[2] ref. to. The observations of the Privy Council in *Gokuldas'* case[2] relating to the state of the art of conveyancing in India and the practice in the case of extinguishment of prior mortgages by purchasers of equity of redemption with notice of a second or subsequent mortgage are true at the present day *D. S. Chaudri v. Jogmaya*[3] ref. to. The doctrine of *Toulmein* V. *Stee re*[4] (1816 is not applicable to Indian transactions.

The ordinary presumption is that a mortgagee takes the ordinary precaution before parting with his money of inspecting the register of the district about the prior incombrances on the property; the same presumption will apply to the case of a mortgagee bringing a suit on his mortgage and a mortgagee should ordinarily be presumed to be aware of the incumbrancers on the property for purposes of S. 85 T.P.A. and where any mortgagee of the property is not impleaded in a mortgage suit, the non-impleaded mortgagee's rights will not be barred by S. 13 C. P. C. (XIV of 1882.)

1. (1883) I.L.R. 9 C. 961 (P.C.)
2. (1884) I.L.R. 10 C. 1035 (P.C.)
3. (1901) I.L.R. 29 C. 154 (P.C.)
4. (1816) 3 Mer 210.

* 16th January 1912.

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Where a third mortgagee who had also acquired a prior its by reason of his discharge of a first mortgage on the property was not impleaded in the suit on the second mortgage wherein a decree for sale was obtained, *held* that the non-impleaded mortgagee's rights were not barred by res judicata as against the second mortgage.

2. That if he had been impleaded in the prior suit the 2nd mortgagee would have been allowed to redeem the third mortgagee to the extent of the lien he had by reason of the discharge of the first mortgage and the 3rd mortgagee would in his turn have been allowed to redeem the second mortgagee.

3. Where the enforcement of the priority acquired by the third mortgagee in respect of the first mortgage became barred by limitation before his suit, the subsisting right of his was only to redeem the second mortgagee.

Appeal from a judgment and decree of the High Court at Calcutta, of the 3rd March 1905, on three appeals on the part of certain of the respondents herein from the judgment and Decree of the Subordinate Judge of the Second Court of Patna, of the 9th July 1902, refusing to the plaintiffs' appellants a portion of the relief which they claimed.

Their Lordships' Judgment was delivered by

Sir John Edge :—This is an appeal by the plaintiffs against the decree of the High Court of Judicature at Fort William in Bengal, dated the 3rd March 1905, which varied the decree of the Subordinate Judge of Patna of the 9th of July 1902.

The suit was brought on the 22nd of September 1900, in the Court of the Subordinate Judge on a simple mortgage of the 17th of February 1888, to recover Rs 12,000 as principal, Rs. 23, 150 as interest to the date of suit, and future interests until realization. That mortgage, as will later appear, was executed in favour of Mussamat Alfan, whose heirs assigned it to the Plaintiffs on the 16th of June 1891. The Plaintiffs also claimed to have it declared that the properties covered by the mortgage of the 17th February 1888, and by a *Zarpeshgi* deed of 20th of November 1874, were liable for the entire decretal amount; that certain of the Defendants should be directed to pay the decretal amount to the Plaintiffs within a time to be fixed by the Court, and that in default of payment the decretal amount should be realized by the sale of auction of the mortgaged properties included in the mortgage of the 17th of February 1888, and the *Zarpeshgi* deed of the 20th of November 1874. Various issues were raised by the Defendants, and much

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more or less conflicting evidence was recorded, but the facts so far as they are material in the view taken by their Lordships may be briefly stated.

On the 20th of November 1874, Nanda Kumar Singh on his own behalf, and as the husband and agent of his wife, Mussamat Lalpeari Dasi, executed a *Zarpeshgi* deed in favour of Girwar Singh, for the sum of Rs 12,000, which was acknowledged to have been received from Girwar Singh, and by that deed mortgaged and hypothecated as security for the *Zarpeshgi* Rs. 12,000 certain properties which included the entire 16 annas of the milkiat and the malguzari right of Mouzah Ghowspur-Dopahsa, No 364, 2 annas of 16 annas of Mouzah Ghowspur-Dopahra, No 362, and 5 annas 4 pies of 16 annas of Mouzah Fatehpur-Law-aech. With the properties which are named above, this appeal is alone concerned. By that deed Girwar Singh was entitled to hold possession of the properties hypothecated until the amount of the *Zarpeshgi* Rs. 12,000 was repaid to him, and it was by the deed amongst other things agreed that Girwar Singh should pay certain expenses, and the Government revenue, should keep out of the usufruct Rs. 900 every year as interest on the *Zarpeshgi* Rs. 12,000, and should pay Rs. 501-13-6 on account of the rent every year by regular instalments to Nanda Kumar Singh and Lalpeari Dasi, and that all the increase in the produce in consequence of proper cultivation should be enjoyed and appropriated by Girwar Singh. It was also by the deed agreed that when Nanda Kumar Singh and Lalpeari Dasi should repay to the *ticcadar*, Girwar Singh, the *Zarpeshgi* Rs 12,000 in one lumpsum at the end of Jeth 1294 Fasli (September 1887) the *ticca* transaction should be cancelled and Nanda Kumar Singh and Lalpeari Dasi should bring the leased properties into their direct possession, but in the case of the non-payment of the *Zarpeshgi* Rs. 12,000 at the end of Jeth 1294 Falsi, the *ticca* transaction should stand good with all its conditions until the payment of the *Zarpeshgi*. Girwar Singh was put in possession under the deed.

On the 15th of December 1879, Nanda Kumar Singh being then dead, his son and heir Kishan Kumar Singh executed in favour of Mussamat Jagattarini Debia simple mortgage of the 2 annas share in No. 362 Ghowspur-Dopahra. On the 3rd May 1890 Dwarkanath Roy, who was the son and heir of Mussamat Jagattarini, then dead, brought a suit for sale on the mortgage of the 15th of December, 1879, and made the mortgagor and the

puisne mortgagees, including the heirs of Mussamat Alfan, who was then dead, defandants to his suit. Their Lordships, concurring with the High Court, find as a fact that the summonses and notices in that suit were duly served upon the heirs of Mussamat Alfan. The heirs of Mussamat Alfan did not appear, and did not defend that suit. On the 20th of November 1890, Dwarkanath Roy obtained in his suit a decree for sale, and under that decree the 2 annas share in No. 362 Ghowspur Dopahra was sold.

On the 31st of December 1880 Kishan Kumar Singh and his mother Lalpeari Dasi executed a simple mortgage in favour of Ragunath Singh and Ganpat Singh of, amongst other properties, the 2 annas share in No. 362 Ghowspur Dopahra and the 16 annas share in No. 364 Ghowspur Dopahra. On the 20th December 1883 Kishan Kumar Singh and Lalpeari Dasi executed in favour of Raghunath Singh and Jagannath Singh a simple mortgage of, amongst other properties, the 2 annas share in No. 362 Ghowspur Dopahra and the 16 annas share in No. 362 Ghowspur Dopahra. On the 15th July 1890, two suits for sale were brought, one on the mortgage of the 31st December 1880 and the other on the mortgage of the 20th of December 1883. Their Lordships, concurring with the High Court, find as a fact that the heirs of Mussamat Alfan were duly made defendants to these suits. The heirs of Mussamat Alfan did not defend either of these suits. Decrees for sale were made in these suits.

On the 7th of January 1888, Kishan Kumar Singh executed in favour of Gajadhur Mahto a simple mortgage of 5 annas 4 pies share in Fatehpur-Law-aech. On the 5th September 1888 Gojadhur Mahto brought a suit for sale on his mortgage of the 7th January 1888 against Kishan Kumar Singh, but did not make Mussamat Alfan a defendant. Gajadhur Mahto obtained a decree for sale: under that decree the 5 annas 4 pies share in Fatehpur Lawaech was sold on the 16th December 1889 to Lalji Mahto. The sale was confirmed on the 22nd of March 1890, and shortly afterwards Lalji Mahto was put in possession. Lalji Mahto died since this suit was brought.

In February 1888 Kishan Kumar Singh borrowed Rs, 12,000 at interest of Re. 1 and annas 4 per mensem from Mussamat Alfan. Their Lordships find as a fact that the Rs. 12,000 was borrowed by Kishan Kumar Singh and was put by Mussamat Alfan for the express purpose of paying off the *Zarpeshgi* debt of Rs. 12,000 as security for which the property mentioned in the *Zarpeshgi* deed

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of the 20th November 1874 was mortgaged and hypothecated by that deed. In consideration of that loan of Rs. 12,000 Kishan Kumar Singh executed on the 17th of February 1888 in favour of Mussamat Alfan a simple mortgage of the properties included in the *Zarpeshgi* deed of the 20th of November 1874. The principal sum of Rs. 12,000 was under that mortgage repayable in two years. The money lent by Mussamat Alfan was in accordance with the agreement between her and Kishan Kumar Singh applied in discharging the *Zarpeshgi* debt of Rs. 12,000 and on the 15th of July 1888 the then holders of the *Zarpeshgi* deed of the 20th November 1874 quitted possession and gave up the *Zarpeshgi* deed, which was delivered to Mussamat Alfan. Mussamat Alfan died on the 10th of December 1889, and on the 10th of December 1889, and on the 16th of June 1891 her heirs assigned the mortgage of the 17th February 1888 to the Plaintiffs, who are the appellants here. On that assignment such rights as Mussamat Alfan had acquired and were then existing passed to the plaintiffs.

On the 22nd of September 1900 the Plaintiffs in whom was then vested Mussamat Alfan's right as mortgagee under the mortgage of the 17th February 1888 filed their plaint in this suit, making then, or by subsequent amendment of their plaint, the representatives of Kishan Kumar Singh, who was then dead, and others who were interested in the mortgage properties or in some of them, defendants. The titles of the defendants, other than representatives of Kishan Kumar Singh, arose under the mortgages which were made subsequently to the 20th of November 1874 and prior to the 17th of February 1888.

The Subordinate Judge decreed the suit for sale with costs, giving the Defendant No. 1, a right to redeem the mortgagee so far as it affected the properties other than No. 362 Ghospur Dopahra No. 364 Ghospur Dopahra and Fatehpur-Lawaech by payment within 90 days of the decretal amount with costs. The defendants Nos. 8 to 13 were given a right to redeem the mortgage, so far as it affected No. 364 Ghospur Dopahra, by payment within 90 days of Rs. 4,000 with proportionate costs. The Defendant No. 15 was given a right to redeem the mortgage, so far as it affected No. 352 Ghospur Dopahra, on payment of Rs. 4,000 with proportionate costs; and any of the Defendants Nos. 5, 6, and 14 were given a right to redeem the mortgage, so far as it affected Fatehpur-Lawaech on payment within 90 days of Rs. 4,000 with proportionate costs. The High Court on appeal dismissed the suit with

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costs so far as it applied to Nos. 364 and 362 Ghospur Dopahra and Fatehpur-Lawaech.

The High Court held that the Plaintiff's suit, so far as it applied to No. 364 Ghospur–Dopahra and No. 362 Ghospur Dopahra was barred by Section 13, Explanation II, of the Code of Civil Procedure by reason of the heirs of Mussamat Alfan not having set up in the suits of the 3rd of May 1890 and 15th of July 1890, "their title as prior mortgagees on the basis of the *Zarpeshgi* 1874, the ground of relief in the present action." Mussamat Alfan's mortgage of the 17th February 1888 was not prior to the mortgages of the 15th of December 1879, the 30th of December 1880; and the 20th of December 1883, but the Plaintiffs, Appellants here, claimed priority as the Rs 12,000 which Mussamat Alfan had lent in 1874 were applied to discharge the debt secured by *Zarpeshgi* deed of 1874. The heirs of Mussamat Alfan were persons having an interest in the properties comprised in the mortgages of the 15th of December 1879, the 31st of December 1880 and 20th of December 1883, and consequently were under Section 85 of the Transfer of Property Act, 1882, necessary parties to the suits for sale on those mortgages and were made defendants to those suits and not having set up in those suits such rights as they had under the mortgage of the 17th of February 1888 and the *Zarpeshgi* deed of 1874, section 13, Explanation II of the Code of Civil Procedure applied and the claims of the plaintiffs' appellants as against No. 364 Ghospur Dopahra, and No. 362 Ghospur Dopahra, and those of the defendants who are alone concerned with those mouzhas are barred. The High Court rightly dismissed the suit with costs so far as it related to No. 364, Ghospur Dopahra, and No. 362 Ghospur-Dopahra.

It remains to be considered whether the Plaintiffs had and could have enforced in this suit, any and what rights against the 5 annas 4 pies share in Fatehpur-Lawaech, and against Gajadhur Mahto and Lalji Mahto, Defendants 5 and 6, or either of them. It is not quite obvious on what grounds the High Court dismissed the suit so far as it related to the 5 annas 4 pies share in Fatehpur-Lawaech, and to the defendants Gajadhur Mahto and Lalji Mahto.

Gajadhur Mahto did not make Mussamat Alfan a Defendant to the suit for sale which he brought on the 6th of September 1888 on his mortgage of the 7th of January 1888. That suit was brought to obtain a decree for sale of the 5 annas 4 pies share in Fatehpur-Lawaech which had been mortgaged on the 7th of January 1888 to Gajadhur Mahto and subsequently on the 17th of

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February 1888 to Mussamat Alfan, and had been mortgaged and hypothecated to Girwar Singh by the deed of the 20th of November 1874 as security for the *Zarpeshgi* debt of Rs. 12,000. Under the deed of the 20th November 1874 the Rs. 12,000 was not repayable to Girwar Singh until Jeth 1294 Fasli (September 1887), and consequently the 12 years allowed by Article 132 of the Second Schedule of the Indian Limitation Act, 1877 within which a suit to enforce payment of that debt was allowed, hat not expired when Girwar Singh brought his suit. It has been contended, that as Mussamat Alfan when, she lent her Rs. 12,000 to Kishan Kumar Singh in February 1888 to pay off the *Zarpeshgi* debt of Rs. 12,000 did not obtain a formal assignment in writing of the *Zarpeshgi* deed of the 20th November 1874, and as the *Zarpeshgi* debt of Rs. 12,000 was discharged by payment to the representatives of Girwar Singh on the 15th of July 1888, and they quitted possession, Mussamat Alfan did not in equity obtain the benefit of the charge which Girwar Singh had under the *Zarpeshgi*deed of the 20th of November 1874. It is true that so far as the Zarpeshgi deed of the 20th November 1874 operated as a lease of the mortgaged properties, it came to an end on the payment of the *Zarpeshgi* debt of Rs. 12,000 to the representatives of Girwar Singh on the 15th July 1888, but their Lordships have found as a fact that the Rs. 12,000 were lent by Mussamat Alfan and were borrowed by Kishan Kumar Singh for the express purpose of paying off the *Zarpeshgi* debt of Rs. 12,000 which was secured by the deed of the 20th November 1874; that the Rs. 12,000 lent by Mussamat Alfan were in accordance with the agreement between Mussamat Alfan and Kishan Kumar Singh applied in paying off the *Zarpeshgi* debt; that on payment of that debt *Zarpeshgi* deed of the 20th November 1874 was handed over to Mussamat Alfan; and that Mussamat Alfan when she lent her Rs. 12,000 intended to keep alive for her benefit and protection the charge which had been created by the *Zarpeshgi* deed of the 20th of November 1874. It has been held by this board, in *Mohesh Lal* v. *Mohunt Bawan Das*,[1] that whether a mortgage paid off is extinguished or kept alive depends upon the intention of the parties. It has also been held by this Board in *Gokuldoss* v. *Rambax Seochand*[2] that the ordinary rule is that a man having a right to act in either of two ways shall be assured to have acted according to his interests. In the last mentioned case it was held by this Board that the purchaser of an equity of redemption in immovable property

1. (1883) I.L.R. 9 C. 961 (P.C.) 2. (1884) I.L.R. 10 C. 1035 (P.C.)

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situated in India who, having notice of a second mortgage, paid off a first mortgage upon the property without an assignment of the first mortgage to him must be assumed, according to the rule of justice, equity and good conscience, to have intended to keep the first mortgage alive, and consequently was entitled to stand in the place of the first mortgage and to retain possession against the second mortgagee until repayment. In that case this Board was pressed to apply the doctrine of *Tolumin* v *Steere*[1] but this Board observed that :—

"In India the art of conveyancing has been and is of a very simple character. "Their Lordships cannot find that a formal transfer of a mortgage is ever made " or an intention to keep it alive ever formally expressed. To apply to such a " practice the doctrine of *Tolumin* v *Steere*[1] seems to them likely, not to promote " justice and equity, but to lead to confusion, to multiplication of documents, " to useless technicalities, to expense, and to litigation."

And their Lordships in that case held that the obvious question to ask in the interest of justice, equity, and good conscience, is, what was the intention of the party paying off the charge? What this Board said in 1884 as to the art of conveyancing in India, and the practice in such cases is true as to the art of conveyancing in India and the practice in such cases is true as to the art of conveyancing and the practice in such cases at the present day. The law on these points applied in the judgments of this Board in *Mohesh Lal* v. *Mohunt Bawan Das*,[2] and *Gokuldoss* v. *Rambux Seochand*,[3] was subsequently applied by this Board in *Dinobundhu Shaw Chowdry* v. *Jogmaya Dasi and others.*[4] Applying the rule of justice, equity, and good conscience their Lordships in this appeal hold that the charge created by the *Zar-peshgi* deed of the 20th of November 1874 was kept alive for the benefit of Mussamat Alfan. Nothing to bar a claim in respect of that charge, so far as the 5 annas 4 pies share in Fatehpur-Lawaech was concerned, had occurred when Gajadhur Mahto brought his suit on the 6th of September 1888.

As their Lordships have said, Gajadhur Mahto did not make Mussamat Alfan a defendent to his suit of the 6th September 1888. Under Section 85 of the Transfer of Property Act, 1882, Mussamat Alfan was a necessary party to that suit. It is not alleged that Gajadhur Mahto when he brought his suit had not noticed that Mussamat Alfan was a person having an interest in the property comprised in the mortgage upon which he was suing. If Gajadhur

1. (1816) 3 Mer 210.
2. (1883) I.L.R. 9 C. 961 (P. C.)
3. (1884) I.L.R. 10 C. 1035.
4. (1901) I.L.R. 29 C. 154 (P C.)

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Mahto had taken the ordinary precaution of inspecting the register of the district in which Fatehpur-Lawaech is situated, before he took his mortgage of the 7th of January 1888, he would have found that the 5 annas 4 pies share in Fatehpur-Lawaech had been charge by the *Zarpeshgi* deed of the 20th November 1874. It is to be presumed that Gajadhur Mahto took the ordinary precautions before parting with his money which a prudent intending mortgagee would take. If Gajadhur Mahto had before bringing his suit of the 16th of September 1888, and in order to ascertain who would be under Section 85 of the Transfer of Property Act, 1882, the necessary parties to his suit, taken the ordinary precaution of searching that register, he would also have found that the 5 annas 4 pies share in the Fatehpur-Lawaech was included in Mussamat Alfan's mortgage of the 17th February 1888. It has been contended that Section 85 of the Transfer of Property Act, 1882, dit not apply to the suit which Gajadhur Mahto brought, the contention being that that section does not apply to a suit for sale of an equity of redemption and that a puisne mortgagee is not a person " having an interest in the property comprised in a mortgage " of a first or any prior mortgagee who brings a suit for sale on his prior mortgage. That contention, if correct, would, as it appears to their Lordships, lead to the conclusion that neither a prior nor a subsequent mortgagee need be made a defendant to a suit for sale by a mortgagee of the specific lands included in his mortgage. The fact is that in suits for sale in India to which other mortgagees are not made parties, what a puisne mortgagee seeks to sell by means of a decree for sale, is not the equity of redemption so described, but the actual property, lands or houses mortgaged. It is not obvious why a puisne mortgagee who desires to sell a mere equity of redemption, and not the actual property, lands or houses described in his mortgage as the property mortgaged to him should not dispose of his interests by private contract by an assignment of his mortgage to a purchaser, instead of by bringing a suit for sale of the property, land or houses, mortgaged, unless he hopes by concealing what his real interests are to obtain a larger price from an unwary purchaser at an auction sale under a decree for sale, than he could otherwise expect to obtain.

Gajadhur Mahto, in his suit for sale, sought for and obtained a decree for sale of the specific 5 annas 4 pies share in Mouzah Fatehpur-Lawaech which had been mortgaged by the *Zarpeshgi* deed of the 20th of November 1874, and Mussamat Alfan's mort-

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gage of 17th February 1888, and under his decree for sale that 5 annas 4 pies share was sold, and it was sold free of all charges and incumbrances so far as the decree or any documents relating to the decree would show. Had Section 85 of the Transfer of Property Act, 1882, been complied with by making Mussamat Alfan a party to the suit, the decree for sale in Gajadhur Mahto's suit would have dealt with the rights and claims of Mussamat Alfan in relation to the charge under the *Zarpeshgi* deed of the 20th of November 1874, and her mortgage of the 17th of February 1888, if put forward by her in the suit, and Gajadhur Mahto would have been allowed to redeem the charge of 1874 by payment of Rs 12,000 and Mussamat Alfan would in her turn have been allowed to redeem Gajadhur Mahto's mortgage. If Mussamat Alfan had been made a Defendant to Gajadhur Mahto's suit and had neglected to put forward her claims, those claims would have been barred under Section 13 of the Code of Civil Procedure. In either event all intending purchasers at a sale under the decree would have known what rights were to be sold, and in either event the necessity for the bringing of this present suit, so far as the 5 annas 4 pies share in Fatehpur-Lawaech is concerned, would not have arisen.

As Mussamat Alfan was not made a defendant to Gajadhur Mahto's suit, her rights were not affected by the decree in that suit, and Section 13 of the Code of Civil Procedure did not bar this suit of the Plaintiff so far as the 5 annas 4 pies share in Fatehpur-Lawaech and the Defendants Gajadhur Mahto and Lalji Mahto were concerned. But as the Rs. 12,000 were under the *Zarpeshgi* deed of the 20th of November 1874, repayable in Jeth 1294 Fasli (September 1887) and this suit was not brought until the 22nd of September 1900, the claim of the Plaintiffs to priority is barred by Article 132 of the Second Schedule of the Indian Limitation Act, 1877, and all that they are entitled to so far as the 5 annas 4 pies share in Fatehpur-Lawaech is concerned is a decree entitling them to redeem the mortgage of the 7th January 1888 on payment to the legal representatives of Lalji Mahto of the amount of principal and interest in respect of which the 5 annas 4 pies share in Fatehpur-Lawaech was sold to him under the decree for sale in Gajadhur Mahto's suit of the 6th September 1888.

Their Lordships will humbly advise His Majesty that the decree of the High Court so far as it operated as a dismissal of the plaintiff's suit for sale of the 5 annas 4 pies share in Fatehpur-Lawaech, and dismissed with costs in the High Court and in the

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Court of the Subordinate Judge the plaintiff's suit as against Gajadhur Mahto and Lalji Mahto, should be varied by decreeing that the plaintiffs, appellants here, by payment to the legal representatives of Lalji Mahto, or into the High Court to their credit within 9 days from the filing of his Majesty's order in the High Court, of the amount of principal and interest in respect of which the 5 annas 4 pies share in Fatehpur-Lawaech was sold to Lalji Mahto under the decree of Gajadhur Mahto in the suit of the 6th of September 1888, may redeem the mortgage of the 7th of January 1888, and may bring the 5 annas 4 pies share to sale for the balance then remaining due of the amount of principal and interest decreed by the Subordinate Judge in this suit; by decreeing that the plaintiff's shall have their proportionate costs of the suit in the Court of the Subordinate Judge and appeal to the High Court in respect of their claim against the 5 annas 4 pies share in Fatehpur Lawaech and the defendants Gajadhur Mahto and Lalji Mahto, the amount of such costs to be ascertained by the High Court, and any costs paid by the appellants to Gajadhur Mahto and Lalji Mahto or his legal representatives or any of them shall be repaid to the plaintiffs and that in all other respects the decree of the High Court be affirmed, but that there shall be no costs of this appeal.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB]

PRESENT:—Lord Macnaghten, Lord Robson, Sir John Edge and Mr. Ameer Ali.

Ibrahim Ali Khan v. Muhamed Ashan Ullah Khan.

Nawab Ibrahim Ali Khan (Defendant) ... Appellant*

v

Nawab Muhamed Ashan Ullah Khan and another.
(Plaintiffs)—Respondents

and

Nawab Mahammad Ashan Ullah Khan and another,
(Plaintiffs)—Appellants

v

Nawab Ibrahim Ali Khan, (Defendant)—Respondent.

Hindu Law—Impartible estate—Kunjpura estate—Withdrawal by Government of chief's power in 1849—Effect of withdrawal on succession to the estate and to that acquired by the chiefs after the withdrawal.

On a question as to the custom of succession to the Kunjpura estate: *held*: that the estate was an impartible raisat and the rule of succession for the same was the rule of primogeniture.

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* 30 Jan. 1912.

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That the withdrawal in 1849 from the Chiefs, by the Government, of civil and criminal powers which the chiefs had exercised till then did not effect any alteration in their status or vary the rule which had governed the succession to the estate inclusive of the acquisitions by the Chiefs after the date of the withdrawal.

Two consolidated Appeals from a Judgment and Decree of the Chief Court of the Punjab (Dec. 21, 1906), which in part reversed a Decree of the District Judge of Karnal (Nov. 30, 1904), in whose Court the Plaintiffs, Nawab Muhammad Ashan Ullah Khan and Muhammad Yusaf Ali Khan, brought a suit against the defendant Nawab Ibrahim Ali Khan for partition and possession of four-fifths of the movable and immovable property left by one Nawab Muhammad Ali Khan, Jagirdar of Kunjpura and for rendition of accounts.

The District Judge dismissed the suit. The Chief Court on appeal, reversed the Decree of the District Judge and ordered that the claim of the Plaintiff in respect of a portion of the property in dispute should be dismissed, and in respect of another portion thereof, should be decreed.

Sir Robert Finlay K. C. and O. Gorman for the appellants.

De Gruyther K. C. and G. E. A. Ross for the respondent.

Their Lordships' judgment was delivered by

Mr. Ameer Ali:—The sole question for determination involved in these two Appeals relates to the rule of succession applicable to the Kunjpura State lying in what are called the Cis-Sutlej Districts of the Punjab.

The Kunjpura *riasat* lies about 100 miles to the North of Delhi, in the District of Karnal, and was founded in the first half of the 18th century by an Afghan soldier of fortune of the name of Najabat Khan, who like many other adventurers, native and foreign, had taken advantage of the troublous times when the whole fabric of the Moghul Empire had fallen to pieces to carve out a small principality for himself. In 1748 he obtained a *sanad* from the Afghan conqueror Ahmed Shah Abdali, also called Durani, then in the height of his power in Northern India, granting him a "heriditary "Jagir" of the villages, 149 in number of which he was in possession at the time. The villages were declared to be *inam*, or revenue free; and he was to enjoy thenceforth the revenue payable to the Imperial Government, subject to the obligation of maintaining order in his *ilagua* or possessions.

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It is not disputed that the chiefship has from the time of Najabat descended in the male line to a single heir, and that heir has been invariably the eldest son, save in one instance, where the deceased *rais* left no issue, and was succeeded by his eldest surviving brother.

Nawab Muhammad Ali Khan, the seventh in descent from Najabat Khan succeeded to the chiefship in the year 1849. He died in 1886, leaving several sons, three of whom only are now surviving, viz. the defendant Ibrahim Ali Khan, the eldest and the two plaintiffs, respondents in the first appeal.

He left also three daughters, but both parties are agreed that by the custom of the family they receive no share in his inheritance.

The defendant was a minor at the time of his father's death, and during his minority the Court of Wards managed the estate. In 1900 he attained majority and assumed charge of the properties.

The plaintiffs claim that under the Mahomedan Law, which they allege governs the succession in their family, they are entitled to shares in the Kunjpura Estate, and they brought this suit against the defendant in the Court of the District Judge of Karnal for partition, possession and "rendition of accounts."

The defendant contested the action on the allegation that the estate of Kunjpura was an impartible *raisat* or principality which had been recognised as such by the sovereign power, and which had descended under the custom governing the rule of primogeniture, and that the younger male members had no title beyond a claim to reasonable maintenance..

It will be noticed that both parties allege the existence of a custom at variance with the Mahomedan Law with regard to succession in their family; the plaintiffs restrict it to the exclusion of females from inheritance, whilst the defendant asserts that it extends to the younger male members.

The District Judge found in favour of the custom alleged by the defendant, and dismissed the plaintiffs' suit. On appeal the learned Judges of the Chief Court have affirmed the view of the District Judge in respect of all property that appertained the *riasat* prior to 1849, holding that the custom set up by the Defendant, which they found established clearly applied to it. But they were of opinion that as in that year the Government withdrew from the chiefs of Kunjpura the quasi-sovereign powers they had hitherto exercised, the chiefship "ceased as an independent entity,"

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and consequently lands and property acquired by the Nawab after 1849 were not subject to the same rule of succession as was applicable to " lands which once appertained to the " chief as chief."

In this view they decreed the Plaintiffs' claim in respect of their shares under the Muhammadan law in the latter properties.

Both parties have appealed from the Decree of the Chief Court. The defendant contends that the learned Judges are in error in drawing a distinction between the properties held before and those acquired after 1849, and that the custom the existence of which has been found by both the Courts in India, applies to all property. The Plaintiffs on the other hand urge that the custom alleged by the Defendant on whom the onus lay, has not been established; and that in any event the effect of the withdrawal in 1849 from the chiefs of all civil and criminal powers was to reduce their status to that of private citizens, subject to their ordinary personal law. That, in substance represents the contentions of the parties before this Board.

The Chief Court has traced the history of Kunjpura family with much care and discrimination. Their Lordships do not, therefore propose to discuss the evidence at any length, for they find it established beyond doubt that the Estate of Kunjpura has, ever since the time of Najabat, descended to a single heir, who has been recognised as the chief of an impartible *riasat*, which is the Arabic or Mussulman synonym of the Hindu word *raj*; and that attempts by junior members of the family to obtain shares in the *riasat* properties have invariably failed. The two instances on which the plaintiffs rely as showing allotment of shares to Junior cadets of the family appear to their Lordships to be clearly opposed to their contention. The first is the case Karam Sher, the second brother of Gulsher Khan, third in descent from Najabat, who obtained under circumstances that cannot be ascertained at this distance of time, several villages which were separated from the *jagir* and are still held by his descendants. There is nothing, however, to show that the villages Karam Sher received bore any relation to the share he would have been entitled to on partition under the Mahomedan law. Nor does it appear or is even alleged that Gulsher Khan's brothers other than Karam Sher obtained any share of the family properties. In 1851, whilst the *Dastur-ul-awal* or settlement records of these villages were in course of perparation, Nizam Ali Khan, the Son of Karam Sher, applied to have his name entered as *jagirdar* of the villages in question. His application was resisted

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by Nawab Mahommed Ali Khan, who was then the *rais* of Kunjpura on the ground that the villages held by the applicant had been given to him for maintenance, and that they should revert to the chief on his (the applicant's) death without male issue. The Commissioner of the Cis-Sutlej States within whose jurisdiction Kunjpura lay after recording the Nawab's objection made the following recommendation to Government :—

"I think that all the villages and land possessed by the younger branches of " the family should be held, and recorded to be component parts of the chief's " integral estate, that while the present incumbents or any of their descendants " are living the chief be altogether debarred from disturbing or interfering " with their possession, and that, on failure of issue in any branch, the lands " composing the maintenance *(guzarah)* of that branch revert to the chief's " integral estate, in place of lapsing to the government, as they would do, were " they severed from that estate. The *Daster-ul-amal* would thus be drawn in " the name of the *Nawab Rais* (the chief)."

The Commissioner's view was accepted and affirmed by Government on the 31st October 1851, and the final Order was passed by him on the 17th Nov. following. It is clear therefore, that neither the Government nor the chief ever recognised that the villages received by Karam Sher were in lieu of his share by right of inheritance under the Mahomedan law. On the other hand, it was alleged on the first opportunity that offered itself that the villages had been granted to Karam Sher and his male descendants for maintenance, and that they were to revert to the *riasat* on the extinction of his male line, and this contention was accepted and affirmed by the Government.

The other instance is that of Ghulam Muhay-ud-din Khan. Gulsher, died in 1864 leaving several sons, of whom the eldest, Rahmat Khan, succeeded to the *riasat.* Quarrels then broke out between him and his second brother Ghulam Muhay-ud-din about the latter's claim for maintenance, which at last became so violent that the British authorities, who had in the year 1806 assumed charge of the Cis-Sutlej districts were compelled to interfere. The dispute between Rahmat Khan and Ghulam Muhay-ud-din was referred to the arbitration of the Resident at Delhi, Mr. Metcalfe (afterwards Sir Theophilus Metcalfe) and Mr. Fra. As a result of the arbitration Ghulam Muhay-ud-din obtained a number of villages yielding a considerable income. Upon the evidence their Lordships had no hesitation in agreeing with the Chief Court that he received them in lieu of maintenance. In fact some years later, when a younger brother applied for maintenance out of the properties in possession of Rahmat Khan and Ghulam Muhay-ud-din respectively, the latter objected to his being made liable on

the ground that he himself had obtained for maintenance the villages held by him and he was accordingly excepted from the obligation of contributing towards the younger brother's maintenance.

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Ghulam Muhay-ud-din died in 1841, and a claim was put forward on behalf of his minor son, Muhammad Yar Khan, to the possessions of all the villages that had been held by him. But a part only was assigned to Muhammad Yar Khan for his maintenance, whilst the rest reverted to the chiefship.

As already observed, these two cases, far from supporting the plaintiff's allegation, appear to their Lordships to be quite opposed to it. No other evidence has been referred to suggest that there has ever been a division of the estate in accordance with the rules of the Mahomedan law since the time of Najabat Khan. It was however, contended, on behalf of the Plaintiffs that although the *jagir* may be impartible and descendible by the rule of primogeniture, the *Zemindari* rights in the villages comprised in the *jagir* cannot be so treated in the absence of clear evidence of custom applicable to them. In support of this contention reliance was placed on the dictum of Mr. Lawrence (afterwards Lord Lawrence) pronounced in 1852 in a case which had come before him as a member of the Board of Administration. Janbaz Khan and Shahbaz Khan, two younger sons of Rahmat Khan, had preferred a claim for shares in the *Zemindari* rights in one of the villages appertaining to the Kunjpura estate. Their application was dismissed by the Commissioner. On appeal to the Board Mr. Lawrence expressed himself as of opinion :—

"The *Zemindari* rights did not belong to the State, that like other movable "or immovable property, it should be given by right of inheritance according "to Mahomedan law; and that all the descendants of Nawab Rahmat Khan, "who had acquired this *Zemindari*, had rights in it."

The other members appear to have concurred in this view. But the final decision was made dependent on the determination of the question whether Janbaz and Shahbaz had ever been in possession of the shares which they claimed should be recorded in their names. They were found, however, never to have been in possession, and their claim was finally dismissed.

The opinion of Mr. Lawrence, however deserving of respect, affords, therefore, little assistance in deciding the question whether the *Zemindari* rights are subject to a different rule of succession from the *jagir*. The opinion was, in the result, ineffective, and seems never to have been accepted or acted upon in the course of the constant claims the junior members of the family have put for-

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ward to a share in the estate. The decisions in the latter cases lay down in explicit terms that the *Zemindari* rights belong to the *riasat*. Similarly, it is recorded in the *Wajib-ul-arz* that "the entire *biswadari*, *zemindari* and *jagirdari* rights are possessed by the Nawab." Any other conclusion would not only be inconsistent with the policy which the Government has maintained for nearly a century towards these *riasats*, but in the end would prove positively destructive to the chiefships.

It remains, however, to consider whether the view taken by the Chief Court with regard to the rule of succession to acquisitions made by the chiefs after 1849 is well founded. After holding that the custom set up by the Defendant *Nawab* is made out as regards all property which can be shown to have formed part of the estate before 1849, the learned Judges proceed to say:—

"As regards lands subsequently acquired we think the case is different. The custom owed its rise and *roison d'etre* to the existence of the State and the exigencies of chiefship. A family custom, respected by the authorities and fully established as accompanying the chiefship, must be held to obtain as regards the estates of chiefship as such. But when the chiefship ceased as an independent entity, it was not only privileges but duties and liabilities also which were abrogated, and we do not think that lands and property acquired by the *Nawab* after 1849, with income, which he was admittedly competent to deal with as he pleased can be held to be subject to the same rule of succession now as the land which once appertained to the chief as chief."

Their Lordships regret to be unable to follow the reasoning on which the view expressed by the learned Judges proceeds, or assent to the conclusion at which they have arrived. There is nothing to show that the Government in withdrawing the civil and criminal powers, the chiefs had hitherto exercised, intended to make any alteration in their status or to vary the rule which had governed the succession to the Kunjpura Estate. The withdrawal of those powers was no doubt due to the needs of administration but that circumstance cannot affect the custom under which the entire estate descended by the rule of primogeniture to a single male heir.

On the whole their Lordships are of opinion that the appeal of the defendant Ibrahim should be decreed and the plaintiff's suit dismissed. They will accordingly humbly advise His Majesty to discharge the decree of the Chief Court, and to restore that of the District Judge, dismissing the plaintiff's suit.

The plaintiffs will pay the costs of these appeals.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Sankunni Menon v. Govinda Menon.

Present:—Mr. Justice Benson and Mr. Justice Sundara Aiyar

Netumprakkot Kunnath Veethil Sankunni Menon	...	...	...	Appellant. (Plaintiff)
Netumprakkot Kunnath Veethil Govinda Menon	...	...	...	Respondent (Defendent)

Limitation Act Arts, 49, 62 & 120—" Specific moveables"—Money not specific moveable—Suit by Karnavan for Tarwad money received by Anandravan from stranger.

A suit by the Karnavan for recovery of Tarwad money received by the Anandravan from a stranger is a suit for the recovery of money "had and received" within Art. 62 of the Limitation Act.

Money is not "specific moveable property within the meaning of Art. 49 of the Limitation Act.

Art. 120 should be applied only as a last resort in case no other article is applicable; and consequently, a court should see before applying Art. 120 whether no other article would apply.

Second appeal from the decree of the District Court of S. Malabar in A. S. No. 14 of 1910 presented against the decree of the Court of the Subordinate Judge of South Malabar at Palghat in Original Suit No 43 of 09.

J. L. Rozario for appellant.

C. V. Anantakrishna Aiyar for respondent.

The Court delivered the following:—

Judgment:—The plaintiff is the appellant before us in the second appeal. As Karnavans of a Malabar Tarwad he brought this suit for the recovery of Tarwad money (Rs 3000) which the defendant (a junior member of the Tarwad) has been withholding from him (the plaintiff) the defendant having denied the plaintiff's title to receive that amount as Tarwad money from the 6th Nov. 1906 to the plaintiff's knowledge. The cause of action is stated in the 7th paragraph of the plaint to have accrued on the 6th Nov. 1906. The suit was brought on 30th Sep. 1909.

(2). The facts have been found in the plaintiff's favour by the Lower Courts and the only question we have to decide is whether, on these facts, the suit is barred or not, the Lower Courts having dismissed the suit as barred.

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(3). The Lower Courts have held that either article 61 or article 81 of the Second Schedule to the Limitation Act, applies to a suit "for money payable to the plaintiff for money paid for the defendant." The plaintiff in this case did not pay any money for the defendant (to any creditor of the defendant or otherwise) but claims money belonging to the plaintiff which the defendant had all along admitted to be Tarwad money till November 1906. Neither does article 81 apply as the plaintiff was not a surety and the defendant was not a principal debtor in respect of the Tarwad money in the hands of the defendant. The Lower Courts seem to us to have been misled by the nature of the previous transactions which resulted in the defendant (a junior member of the plaintiff's Tarwad) becoming possessed of the Tarwad money in 1906.

(4) If neither article 61 nor article 81 applies what is the proper article to be applied to the facts? The plaintiff's (appellant's) vakil contended before us that articles 49,60, 145 or the general article 120 applied. Article 49 relates to suits "for specific moveable property or for compensation for wrongfully taking...or detaining...the same." We do not think that a suit for money or for compensation for wrongfully detaining money can be brought under this article as money is not "specific moveable property." Money has been held to come within the phrase "moveable property" in article 89 "By a principal against his agent—for moveable property received by the latter and not accounted for" but it cannot be held to come within the meaning of the phrase "specific moveable property." Specific property is property which is recovered *in specie* i.e., the very property itself, not any equivalent, substitute or reparation. In a suit for money specifiic coins or notes are not claimed, only coins or notes of a certain value. Order 21, rule 31 of the Civil Procedure Code uses the expression "specific moveable." Rule 30 which precedes Rule 31 relates to the execution of decrees "for the payment of money" and Rule 31 to "decree for specific moveable" thus showing that the words "specific moveable" cannot include money."

(5) Article 60 is also inapplicable as the plaintiff did not make any deposit of money with the defendant, but the defendant got the Tarwad money into his hands from the person with whom it had been deposited. Article 145 is likewise inapplicable as the defendant was not a depository or pawnee. The last article relied on by the appellant is the residuary article 120 but it should be

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applied only as a last resort (see *Sharooh Dass Mondal* v. *Joggessur Roychowdhry*[1]) if no other article is applicable and we have therefore to see if really no other article applies. We are of opinion that the correct view is that the defendant—received the money for the use of the plaintiff as representing the Tarwad. In that view art. 62 is applicable. The application of this article is fully discussed in *Mahomed Wahib* v. *Mahomed Ameer*[2] As observed in Blackstone's commentaries Volume 3 p. 162, an action lies "when one has had and received money belonging to another without any valuable consideration given on the receiver's part, for the law construes *this to be money had and received for the use of the owner only*; and implies that the person so receiving promised and undertook to account for it to the true proprietor, and if he unjustly detains it an action on the case lies against him for the kind of such implied promise and undertaking, and he will be made to repair the owner in damages equivalent to what he has detained in violation of such of his promise. This is a very extensive and beneficial remedy applicable to almost every case when the defendant has received money which *exacquo et bono* he ought to refund." In the present case, as in the case of *Mahomed Wahib* v. *Mahomed Ameer*[2] the money was received by the co-sharer of the plaintiff, and it may be said "these words never aptly describe the present case : the defendant has received monies belonging to the plaintiff which *exacquo et bono* he ought to refund, the plaintiff's cause of action therefore is for money had and received to the plaintiff's use, and the money is more the less received to the use of the plaintiff " because the defendant unjustly detains it for his own benefit." In *Subanna Bhatta* v. *Kunhanna Batta*[3], Art. 62 was applied when money was received by a benamidar for the plaintiff. See also the decision of the Privy Council in *Syed Latif Ali Khan* v. *Afzalunissa Begum*[4].

The period of limitation under Art. 62, is 3 years from th. date of receipt of the money (1904) and this suit is therefore barred. We therefore dismiss the second appeal with costs.

1. (1899) I. L. R. 26 C. 566.
2. (1905) I. L. R. 32 C. 527.
3. (1907) I. L. R. 30 M. 298.
4. (1871.) 9 B. L. R. 348.

Venkata-subbier v. Chinnasamier.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Justice Abdur Rahim and Justice Ayling.

Kuppier *alias* Venkata Subbier ... ... Appellant (*Defendant.*)

v.

Kota Chinnasamier and others ... ... Respondents (*Plaintiff & 5th Defendant*)

Hindu Law—Widow—Alienation without legal necessity—Consent of, or ratification by, the reversioners for the time being—Validity of.

In Madras, alienation, by a Hindu widow made with the consent of the next reversioners at the time of the alienation or consented to or ratified after the transaction by the reversioners, for the time being, will be good and valid apart from any question of legal necessity. *Pilu* v. *Balaji*[1] diss. from.

Second appeal against the decree of the District Court of Chingleput in A.S. No. 404 of 1907, presented against the decree of the District Munsiff Tiruvellur in O.S. No. 576 of 1906.

L. A. Govinda Raghava Aiyar and *A, Ramachandra Aiyar* for appellant.

The Advocate-General P. S. Sivaswami Aiyar for respondent.

The Court delivered the following:—

Judgment:—One of the issues in the case was whether the plaintiff was estopped from questioning the alienation in favour of the defendants under Exhibit I. The District Munsif found this issue in favour of the plaintiff but the District Judge's finding on the point cannot be said to be satisfactory. But before stating the points on which we think we ought to have a clearer finding it is necessary that we should state the effect of the rulings as we understand them, as to what would constitute estoppel under circumstances like those of present case preventing the reversioner claiming the estate on the *death* of a Hindu widow from questioning an alienation made by the widow with the consent of the person who was the next reversioner at the time the consent was given. The law as laid down by the Judicial Committee in *Baj rangi Singh* v *Manokarnika Baksh Singh*[2] is that if the next reversioner either at the time of the alienation or after such alienation consents to or ratifies, the transaction, such transaction cannot be reopened by the people who happen to be the nearest reversioners at the time of the widow's death. The consent of the person entitled to the reversion would by itself validate the alienation apart from any question of legal necessity. If the

S. A. No. 1945 of 1908. 23rd February 1911.

1. (1909) I.L.R. 34 B. 165. 2. ((1907)) I. L. R. 30 A. 1.

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person who was not the next reversioner at the time of the alienation would be estopped by conduct of the next reversioner there can be no question but that the latter would be estopped by his own conduct. So far the law is clear and has not been doubted at least in this Presidency, see *Rangappa Naick* v. *Kamti Naick*,[1] but it is argued on behalf of the Plaintiff (the respondent in this appeal) that the ruling of the Privy Council must be understood as being applicable only to cases in which the alienation by a widow was made for consideration though not for legal necessity. There seems to us to be no warrant for this argument. No doubt the Bombay Courts interpret the decision of the Privy Council to mean that the consent of the next reversioner should be treated only as evidence of legal necessity. See *Pilu* v. *Balaji*.[2] But this as we have said, is not the view of the law which has found favour in this Presidency.

It is next argued on behalf of the respondents that according to the law as laid down by the learned *Chief Justice* and *Sankaran Nair J.* in *Rangappa Naick* v. *Kamti Naick*[1], and again by the learned *Chief Justice* and *Miller, J.* in *Muthuveera Mudaliar* v. *Vythilinga Mudaliar*[3], alienation by a widow of a portion only of her husband's estate without justifying necessity would not be validated by consent of the next reversioner. On the other hand, *Wallis* J. in the first case propounded a different view.

We propose therefore not to decide this question of law at present, as we have no finding of the lower appellate Court on the point.

As regards the findings of the learned District Judge on the question of consent or ratification he says there is no evidence of consent on the part of the plaintiff. In this he is wrong. For instance, there are, the statement in Exhibit V. that the Plaintiff had been given some land by the widow so that he might perform her funeral obsequies, the recital in that document that the widow had already sold the lands comprised in pattah 13 to the father of the first defendant, and the fact that the document purports to be attested by the plaintiff. No doubt the plaintiff denies having attested the document, but the District Judge has not found whether Exhibit V was attested by the plaintiff or not. There is also the alleged fact that the plaintiff exchanged some of his own lands with land sold to the defendant in addition to the circumstances alluded to by the District Munsiff in his judgment. It is

1. (1908) I. L. R. 31 M. 366 F. B. 2. (1909) I. L. R. 34 B. 165.
3. (1908) I. L. R. 32 M. 206.

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for the District Judge to say whether he believes the evidence relied on to prove consent on the part of the plaintiff and what weight he would attach to the evidence and the circumstances we have just mentioned. All that we are pointing out to the learned Judge is that there is evidence from which he might infer, if he so chooses, consent on the part of the plaintiff. We must therefore ask the District Judge to return a revised finding on the question whether the plaintiff gave his consent to and ratified the sale to the defendants, and if so, when. He will also find whether at the time of the consent or ratification the widow had divested herself of all or practically all the estate. The finding should be submitted within six weeks and seven days will be allowed for filing objection.

In compliance with the order contained in the above judgment the District Judge submitted a finding to the effect that the defendants failed to discharge the burden of proof imposed on them and found the issue against them.

After the receipt of the above finding the court delivered the following judgment.

We accept the finding which in our opinion is not open to legal objection. The result will be that the second appeal will be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, KT., Chief Justice, Mr. Justice Sankaran Nair, and Mr. Justice Ayling.

and

On certificate by the Advocate General under cl. 26 of the Letters Patent.

Before:—Mr. Justice Benson, Mr. Justice Wallis, Mr. Justice Miller, Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar.

The King-Emperor ... ...

v.

Nilakanta *alias* Brahmachari and others ... Accused.

Evidence Act, Ss. 25, 30, 133, 114 ill. b,-157—Approver's Evidence—Corroboration, necessity for—Previous statements by approver, if corroboration—"Legally competent to investigate"—Office of C. I. D.-Local area—Evidence Act—S. 25, Scope of—Criminal Procedure Code S. 162, Oral Evidence of statement—Police diary, use of by Police witness—Letters Patent, Cl. 25, 26—Applicability of, to Act XIV of 1908—Cl. 26—Scope of Enquiry under—Whole case how far open.

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* S. B. No. 1 of 1912. 15th February 1912.

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Per *Majority of the Special Bench* and *Full Bench.*—The proper direction in the case of approver or accomplice evidence is this :—"Consider the evidence of the approver, always bear in mind that it is tainted evidence, scrutinize it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then, if you believe it, act on it even if there is no corroboration in the strict sense of the word. If you do not believe it, reject it. The character of the corroborative evidence which may lead the court to believe that the evidence of the *informer* is true depends entirely on the nature of the charge and the facts of the case. Oral testimony of independent witnesses is not necessary. What are " material particulars " in each case must depend on the facts of the case.

Per *Sankaran Nair J*:—(concurred in by *Abdur Rahim* J.) A person should not be convicted except under "very special circumstances" upon the uncorroborated testimony of an accomplice.

2. The special circumstances are that the grounds on which an accomplice's evidence has been held to be untrustworthy did not either exist in the case or did not exist in their full strength ; that there are countervailing considerations of greater weight which diminish or entirely get rid of the weight due to such presumptions.

3. The confirmation that is required is the confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged *i.e.*, the corroboration must be of some incident which will raise an inference of guilt of the accused.

Per *Chief Justice* and *Ayling* J. (affirmed by *Benson, Wallis, Miller* JJ.) (*Sankaran Nair* J. dissenting and concurred in by *Abdur Rahim*, and *Sundara Aiyar* JJ.)

Prior statements of the approver himself will be corroborative evidence contemplated in *ill. b.* to S. 114 of the Evidence Act.

Per *Chief Justice* and *Ayling* J.:—(affirmed by *Benson, Wallis, Miller* JJ.) An officer of the grade of an Inspector of the C. I. D. Department is an officer legally competent to investigate within the meaning of S. 157 of the Evidence Act, and the Criminal Procedure Code ; and his local area is the Presidency in which he is employed, notwithstanding that there is no formal order appointing the particular officer to the Presidency as his local area.

Per *Sankaran Nair* J. (concurred in by *Abdur Rahim* and *Sundara Aiyar* JJ.) Police officers entitled to investigate an offence are the Police officers referred to in Cr. P. C. *i.e.*, the Station House Officer or his Superior officer, the Inspector of Police ; and the power to investigate is vested only in these Police Officers who have only local jurisdiction.

Per *Benson, Wallis, Abdur Rahim, Sundara Aiyar* JJ. affirming *Sankaran Nair* J. Contra (*Miller* J. concurring with *Chief Justice* and *Ayling* J.) :—S. 25 of the Evidence Act precludes the admission of a confession made to a Police officer by a person both as against the person making it as well as against others for any purpose whatsoever.

Per *Chief Justice* and *Ayling* J. (concurred in by *Miller* J.) :—S. 25 of the Evidence Act does not preclude the admission of a confession made to a Police Officer by a person not on trial against others on trial as corroboration of his statement made in the trial of others in proof of the truth of his deposition as a witness.

Per *Special Bench* :—Oral evidence of what a person stated to a Police witness is not precluded by S. 162, Cr. P. C.

King-Emperor *v.* Nilakanta.

Per *Chief Justice* and *Ayling* J. (concurred in by *Wallis, Miller, Abdur Rahim* and *Sundara Aiyar* JJ. *Benson* J. dissenting) For purposes of S. 162 Cr. P. C. using as evidence means only putting in the written record as documentary evidence in the case; but the statement of the officer himself as to what was stated to him is admissible.

Per *Sankaran Nair* J. :—The words "such writing shall not be used in evidence" may fairly be construed to mean not only that such writing cannot be proved but also that secondary evidence of such writing cannot be given.

When a witness gives his evidence from actual recollection of the fact which came to his memory on reading his diary, he cannot be said to be using the document in evidence.

In order that a statement by an accomplice may be evidence against others, it is necessary there must be an admission of guilt of the person making the statement or facts must be stated from which there may be an inference of his guilt.

A police witness cannot refer to his dairy in the witness box.

By the *Full Bench* :—Cl. 25 & 26 apply to all criminal trials before the High Court whether in the exercise of its ordinary or extraordinary original criminal jurisdiction under Cl. 22 & 24 of the Letters Patent or of any future statutory original criminal jurisdiction that may be conferred upon it by the Legislature *e.g.* as in Act XIV of 1908.

Per *Benson*, and *Sundara Aiyar* JJ:—A certificate under Cl. 26 of the Letters Patent has not the effect of opening up the whole case as if on appeal; but it only gives the court power or authority to review the case or so much of it as may be necessary in order to determine the point or points of law raised.

Case sent up by the Sub-Divisional First Class Magistrate of Tinnevelly (Preliminary Register Cases Nos. 3 to 6 of 1911 on his file) for trial by the High Court under the provisions of the Indian Criminal Law Amendment Act, XIV of 1908.

The Public Prosecutor *C. F. Napier*, assisted by *T. Richmond* and *A. Sundara Sastriar.* — *for the Crown,*

J. C. Adam ... ... *for the 1st Accused,*

T. Prakasam ... ... *for the 2nd, 10th and 14th Accused,*

M. D. Devadoss and *J. L. Rosario* and *E. S. Chidambaram Pillay,* — *for the 3rd and 8th Accused,*

B. Narasimha Row and *T. M. Krishnaswami Iyar,* — *for the 4th and 5th Accused,*

N. K. Ramasami Aiya ... ... *for the 6th Accused,*

L. A. Govindaraghava Aiyar and *L. S. Veeraragava Aiyar,* — *for the 7th Accused,*

M. G. Kuppusami Aiyar ... ... *for the 9th Accused,*

S. T. Srinivasa Gopalachariar and *S. Muthia Mudaliar* — *for the 11th and 12th Accused,*

and

V. Ryru Nambiar ... ... *for the 13th Accused.*

This case coming on for trial before the Special Bench (consisting of the *Chief Justice, Sankaran Nair* and *Ayling* JJ.) constituted under the provisions of the Act XIV of 1908 the Court delivered the following.

Judgments:—*The Chief Justice* and *Ayling*, J.:—In this case 14 persons have been committed for trial to this Court under section 6 (b) of the Indian Criminal Law Amendment Act, 1908 (Act XIV of 1908). The 1st count of the indictment charges them with conspiracy within section 121 A of the Indian Penal Code. The conspiracy is alleged to have been entered into between January 1910 and June 17th, 1911 at various places mentioned in the indictment. The 14 accused are alleged to have conspired with certain others, not now before the Court, whose names are mentioned in the indictment,—One Vanchi Aiyar, who was proved in this case to have shot himself after murdering Mr. Ashe on the 17th June 1911, one Dharmaraja Aiyar, who is dead (the case for the Crown being that he committed suicide), one Arumugam, one Somasundaram and one Ramaswami Aiyar, who have been called as witnesses in this case, and one Madasawmi who has absconded.

The 2nd count of the indictment charges the same persons with abetting the murder of Mr. Ashe by engaging in a conspiracy, one of the objects of which is set out in the indictment.

As regards the 1st charge the essence of the offence is the agreement to do all or any of the unlawful acts mentioned in the section. It is not necessary that any act or illegal omission should take place in pursuance of the agreement.

In this case as regards the accused other than Vembu Iyer, Savadi Arunachellam Pillai and Alagappa Pillai, accused Nos. 10, 11 and 12, we have not to consider whether on the facts proved an antecedent agreement to commit all or any of the offences mentioned in the section may reasonably be inferred. There is evidence that all the accused persons, except accused Nos. 10, 11 and 12, agreed under an oath to do certain acts which, in our opinion, undoubtedly come within the purview of section 121-A of the Indian Penal Code. In the course of the many legal arguments which were addressed to us by counsel and vakils for the several accused in the course of this protracted trial, it was never seriously contended that the evidence adduced on behalf of the Crown, if true, did not establish an agreement to do any one of the unlawful acts mentioned in section 121-A of the Indian Penal Code.

As regards the 1st charge therefore—and we deal with that first—the question we have to consider is how far have the facts

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which the prosecution has sought to establish been proved by evidence which is legally admissible.

Although with reference to the 2nd count it was necessary for the Crown to adduce evidence as to the circumstances in which Mr. Ashe was murdered, and it was proved that he was murdered by Vanchi, so far as the 1st charge is concerned the evidence as to the circumstances in which the murder was committed have very little, if any, bearing on the question whether the accused, or any of them, are guilty under section 121-A of the Indian Penal Code.

The murder of Mr. Ashe is, however, the starting point in the history of the investigation of this case.

Mr. Ashe, Collector of Tinnevelly, was murdered on the platform of Maniyachi Railway Station in the Tinnevelly District on June 17th, 1911. The murderer who was identified as one Vanchi Aiyar of Shencottah in Travancore Territory, used an automatic revolver, and almost immediately afterwards shot himself dead with the same weapon. A paper found on his body pointed to the murder having been committed from political motives: and as, from this and other attendant circumstances it seemed probable that he had accomplices, an investigation was started and conducted by the local police in conjunction with the officers of the Criminal Investigation Department. As a result evidence is said to have been forthcoming tending to show that Vanchi Aiyar and others (including the present accused) had been engaged for some time in a conspiracy for the overthrow of British rule by means of a simultaneous massacre of all Europeans on a day to be fixed.

The treasonable conspiracy which is charged in the 1st count of the indictment according to the prosecution had its inception early in April 1910 and was set on foot by the 1st accused; Nilakantam Aiyar *alias* Nilakanta Brahmachari. Nilakantam is a young man of 21 years of age of good education, a native of Erukkoor near Shiyali in the Tanjore District. He had admittedly been previously engaged in journalistic work very largely, if not mainly, of a seditious nature, and his last employment had been as editor of the "Suryodya," a vernacular paper published in Pondicherry which was proscribed by Government in March 1910.

According to the prosecution the suppression of this and other seditious papers compelled the revolutionists who had their head-quarters in Pondicherry to adopt other methods of spreading their propaganda; and for this purpose Nilakantam visited Tenkasi in

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the Tinnevelly District early in April. There is evidence to show that he was no stranger to the District and by his own account he was an old friend of 3rd accused, M. Chidambram Pillai, a young grocer living in Tenkasi Town.

It was in the latter's house that the first meeting is said to have been held on the evening of April 10th. Besides first and third accused three other men are said to have been present: 2nd accused, a young Brahmin of Kadayanallur some twelve miles from Tenkasi, 13th accused, another Brahmin from a distant village in Ottapidaram Taluk, and one K. V. Arumugam Pillai, a young Vellala clerk of Tuticorin, who for the past two years, had been according to his own evidence (page 143) taking interest in seditious politics, and who had been summoned for the purpose of the meeting by Sankarakrishna Iyar, 2nd accused. According to Arumugam, who figures as the 6th prosecution witness in the case, Nilakantam explained his views which were briefly to the effect that the injustice of the Government and the miserable state of the country rendered it necessary that the British should be driven out and "Swaraj" obtained: that previous endeavours to effect this by means of preaching, newspapers and isolated assassinations having failed, a new plan was to be tried: and that this was to take the shape of a general rising all over the country on a date to be subsequently fixed and the massacre of all white people on the same day. The other persons present assented to these views, and agreed to join the new movement. Accordingly an oath was drawn up and written on a piece of paper: each man pricked his thumb, and affixed his thumb impression in blood. The general effect of the oath was that the members should kill all white men and sacrifice their person, property and life for the society: and that any who revealed its secrets should be murdered and go to hell. Other formalities were observed, which it is unnecessary to set forth here.

After this meeting the members dispersed, and Nilakantam appears to have gone to his own village and thence to Pondicherry in which latter place he was seen by 3rd prosecution witness, a Cuddalore Vakil on 2nd May 1910. About the middle of June he seems to have left his native place again according to the prosecution on the same errand; and visited Cochin, Alleppey and Quilon on the west coast, where he would appear to have been about June 20th. How he occupied his time is not known, but it would seem that he then first came into contact with Vanchi Aiyar and other Brahmins of Shencottah. Vanchi at the time was employed as a clerk in

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the Travancore Forest Department at Punalur, a place on the Railway line half-way between Shencottah and Quilon. In July he was in Shencottah, where Vanchi leased a house for five days from one Sivagaminatha Pillai (prosecution witness No. 21). From this point Nilakantam seems to have posed, and is referred to, as a "Swami," and the evidence of the prosecution witness No. 21 goes to show that while in his house he held secret interviews with Vanchi, Dharmaraja Aiyar, and two young Vellalas of Shencottah, 11th and 12th accused. He was accompanied by 2nd accused: and, preceded by the latter, he went across to Tuticorin about the middle of July where a second oath meeting was held of a similar character to the one at Tenkasi. Here the oath was again taken by the 1st and 2nd accused and K. V. Arumugam and also by four other men whom he (Arumugam) had directly or indirectly induced to join the society. These were all Vellalars: (1) Somasundram Pillai, a young vakil's clerk, examined as prosecution witness No. 12, (2) Madasawmi Pillai of Ottapidaram, (3) and (4) 4th and 5th accused Muthusawmi *alias* Muthukumarasawmi Pillai and Subbiah Pillai. The latter two are both middle-aged men, one a pot-seller and the other a vakil's clerk, and both of Tuticorin. It was arranged at this meeting that K. V. Arumugam should be the distributing agent of a certain paper called "The Dharmam" published in Pondicherry, which, according to the prosecution, was the chief organ of the movement and a connecting link between the members of the conspiracy.

From Tuticorin 1st accused is said to have returned with 2nd accused to Tenkasi, and in the early part of August he was undoubtedly staying in a room of a bungalow rented from Rama Row, prosecution witness No. 22, at Courtallam, a few miles distant being visited according to this witness by accused Nos. 2, 3, 5, and 11. From there he appears to have gone to Punalur. From this point the story is taken up by prosecution witness No. 16, Ramasawmy Iyer. According to the evidence this man a gramophone performer and petty jewel merchant, was returning from the West Coast to spend the festival of *Avani Avittam* at his native place near Tenkasi. With him was 7th accused, Harihara Iyer, a young cloth merchant of Shencottah who was doing business with his brothers at Alleppey. Both men halted at Punalur and spent a day or two in a small hut belonging to Bapu Pillai (8th accused) a native of the place. 1st and 2nd accused, Madasawmi Pillai and 6th accused, Jagannatha Iyengar of Shencottah were all assembled there. According to prosecution witness No. 16, no sedition was

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talked, though he was sent to fetch copies of "India" a proscribed paper which were in the possession of 3rd accused at Tenkasi.

Prosecution witness No. 16 went on to his village, and after the festival again visited Shencottah where he describes two meetings as having been held at the house of Dharmaraja Iyer above mentioned. Those according to Ramasawmi's evidence were attended by accused Nos. 1, 2, 6 and 11, Vanchi and Dharmaraja Iyer and also by 14th accused Pichumani Iyer. 3rd accused and Madasawmi both attended the second meeting only. 1st accused, Nilakantam, is said to have harangued the others at each meeting on the miserable economical state of India winding up with the pressing necessity of exterminating the English. After the second meeting, 3rd accused and Madasawmi returned to their villages: but the rest of the party proceeded to Punalur, where according to Ramasawmi's evidence after more exhortations from Nilakantam a 3rd oath meeting was held, in very similar style to the others. The parties who took the oath are said to have been accused Nos. 1, 2, 6, 7, 8, 9 and 14, Vanchi, Dharmaraja Iyer and 4 others.

After this meeting Nilakantam returned to his native place Erukkur, and does not appear to have visited Tinnevelly district again, though he undoubtedly kept up a correspondence with Arumugam, Madasawmi, Vanchi and 7th accused for 5 or 6 months longer.

The next incident in the story is an attempt to enrol in the society another Shencottah Brahmin, Venkatarama Iyer, prosecution witness No. 29. From the evidence of this man it appears that before the advent of Nilakantam there existed a sort of secret society at Shencottah called the Bharatta Mata Association, of which he, accused Nos. 6, 7 and 14, Vanchi and Dharmaraja Iyer were members. This society was clearly of a seditious tendency, its chief object being to procure, read and discuss papers from Pondicherry, but there is nothing to indicate that its members, as such, brought themselves in any way within the reach of the law. In March and April 1910, the Pondicherry papers India, Suryodaya and Vijaya were proscribed by Government: and this was naturally followed by the collapse of the society, which is distinctly referred to in a letter of prosecution witness No. 29, dated the 6th June 1910. (Exhibit G-8). Prosecution witness No. 29, by his own account was prevented by illness from attending the meetings held by Nilakantam in July and August:

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but some time after the middle of September he met accused Nos. 6 and 14, Vanchi and Dharmaraja Iyer in the house of the last named. Endeavours were then made to induce the witness to join the new society and take a "Blood Oath:" the object of the new society being indicated as the "beating and driving away of the English". The witness says he refused to join the new society but for the sake of the old one promised to disclose nothing. It has been suggested that the evidence of prosecution witness No. 29 was really the evidence of an accomplice, but we are not prepared to take this view.

During the rest of the year the evidence discloses no event of importance. Vanchi is said to have visited Tuticorin and Ottapidaram: and K. V. Arumugam is said to have continued to distribute the "Dharmam" and pamphlets forwarded to him.

On Jaunary 9th, 1911, Vanchi took 3 months' leave. Two incidents are deposed to in connection with this period. Ramaswami Iyer (prosecution witness No. 16) says that while returning to his house for *Sankranthi*, he stopped at Dharmaraja Iyer's house. The latter told him that Vanchi and 2nd accused had gone to Pondicherry by 1st accused's orders, and that Vanchi had spoken of shooting Europeans on the way. Somasundaram Pillai (Prosecution witness No. 12) says that he visited Madasawmi at Ottapidaram one day in March and there found Vanchi, whom he had not met before. A conversation ensued between the three. Vanchi after again emphasising the fact that the English rule was ruining the country and that it could only be removed if all white men were killed, went on to suggest that Mr. Ashe should be first killed as being the head of the District and an officer who had taken a leading part in suppressing the Swadeshi Steam Navigation Company, and in the events of 1908. It was generally agreed between the three that Mr. Ashe should be shot, and Vanchi said that arms would be obtained apparently from Pondicherry at the proper time: but nothing definite was settled, not even who should do the deed. After this Ramasawmi (prosecution witness No. 16) again takes up the story and describes two meetings which took place at Shencottah in the month of Chitrai (April—May 1911) on successive evenings in the houses of the 11th and 12th accused. According to the evidence for the prosecution an attempt was made after the 1st meeting to enlist a friend of 2nd accused (Sundaram Iyer, prosecution witness No. 25), whom he had brought with him from Kadayanallur for the purpose. Sundaram Iyer by his own account took fright, and refused to join

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them, saying he would think it over; at the actual meetings Vanchi is said to have taken the lead, and to have addressed the others much as Nilakantam had done, on the dual necessity of developing the resources of the country and driving out of the English. Those present included accused Nos. 2, 3, 6, 7, 8, 11, 12 and 14 and Dharmaraja Aiyer. The evidence, however, is not quite clear as to whether addresses of this character were delivered at both meetings or only at the first.

These are the last meetings of the society of which there is any evidence and the rest of the evidence which relates to the murder of Mr. Ashe and the events immediately preceding it, as we have already observed, has little or no bearing on the charge now under consideration.

The nature of the evidence by which the prosecution seek to establish their case has to some extent been indicated above. The most important witnesses are of course Prosecution witnesses Nos. 6, 12 and 16, who were all three on their own showing members of the society founded by Nilakantam. If their evidence be believed there can be no doubt as we have already said that they themselves and every other person who took the "blood oath" and thus pledged themselves to the society at the three chief meetings spoken to were guilty of joining in a conspiracy, punishable under section 121 A, Indian Penal Code.

All the three chief witnesses referred to are approvers: that is to say, persons who have accepted a pardon tendered them by the District Magistrate conditionally on their giving true evidence in this case. It need hardly be said that the evidence of such persons has to be received with caution: and the extent to which, and the conditions under which, it should be acted upon have been the subject of much argument and contention before us.

With regard to the question of corroboration of the evidence of an accomplice it has been sometimes laid down that before it can be acted on it must be corroborated in material particulars. In our opinion this is not the law either of England or of India. As regards India the substantive Enactment is to be found in section 133 of the Evidence Act which expressly declares that a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice. Section 114 deals with presumptions of fact, and by way of illustration of a fact which may be presumed states that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in

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material particulars. This would seem to mean that a presumption of fact may be drawn having regard to the facts of a particular case that the uncorroborated evidence of an accomplice in that case is untrue. Section 114 says in so many words that the presumption may be drawn regard being had to certain matters "in their relation to the facts of the particular case." The legislature has attempted to give further assistance by stating a case in which the Court would be warranted in declining to draw the presumption of fact referred to in illustration (b) to section 114. So far as the staute law is concerned whilst we have an express substantive enactment in section 133 we have in section 114 certain propositions intended to assist the Courts in drawing inferences of fact. Section 114 is not, like section 133, a substantive enactment declaring the law. The authorities have been so fully and so frequently discussed that we do not think any useful purpose would be served by going through them. The High Courts in this country have always professed, as a matter of practice rather than of law, to act upon the principles established in England. Although the practice in strictness rests only upon the discretion of the Judge at the trial it has "obtained so much sanction from legal authority that it deserves all the reverence of law." Russell on Crimes, 6th Edtion, Volume 3, page 646. The question is, what is the practice? It is thus stated by the Lord Chief Justice of England in *Rex* v *Tate*[1] "Probably Cave, J. did not state the law too strongly when he said *In re Meunier*[2] It is not the law that a prisoner must necessarily be acquitted in the absence of corroborative evidence: for the evidence must be laid before the Jury in each case. No doubt it is the practice to warn the Jury that they ought not to convict unless they think that the evidence of the accomplice is corroborated; but I know of no power to withdraw the case from the Jury for want of corroborative evidence, and I know of no power to set aside a verdict of guilty on that ground; but I think he ought to have added, 'assuming that the Jury was cautioned in accordrance with the ordinary practice'."

This is in accordance with the view indicated by Cockburu *C. J.* in *Reg.* v. *Boyes*[3] and by Lord Coleridge *C.J.* in *Reg* v. *Gallagher.*[4] In England, of course, the question has always arisen in connection with the directions given by the Judge to the Jury. In the case before us we are Judge and Jury. We have to direct ourselves. The proper direction seems to us to be—consider the evidence of the

1. (1908) 2 K. B. 680.
2. (1894) 2 Q. B. 415 at p. 418.
3. (1861) 9 Cox criminal cases 32.
4. (1875) 15 Cox criminal cases 291.

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approvers, always bear in mind that it is tainted evidence, scrutinize it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then, if you believe it, act on it even if there is no corroboration in the strict sense of the word. If you do not believe it, reject it. The view that a Court cannot act on the evidence of an accomplice, unless it is corroborated, would lead to the result that a Court could not act on such evidence, when that evidence stood alone although the Court was entirely satisfied that that evidence was true. This, as it seems to us, is not the law. *In re Meunier*,[1] Cave, J. observed "I know of no power to withdraw the case from the Jury for want of corroborative evidence.".

If there is no power to withdraw a case from the Jury on this ground, it cannot be the law that, where a Court is Judge of fact as well as of law the Court as the Judge of fact, is precluded from considering the question whether the unsupported evidence of an accomplice is true or not.

Mr. Napier on behalf of the Crown contended that the well established rule of practice was a rule of practice rendered necessary by the fact that Juries were not trained to discriminate in the matter of evidence, and that the rule was not applicable where facts were found not by a Jury but by the Judge. We do not think this distinction has been suggested in any of the reported cases. We prefer to put it on the grounds stated by Sir John Edge C. J. in *Queen Empress* v. *Gobardhan*[2]. The Chief Justice says "If Jurors believe the uncorroborated evidence of an accomplice, and that evidence, if believed, establishes the guilt of a prisoner, are they to violate their oaths, and, contrary to their oaths and the uncorroborated evidence of the accomplice which they believe, to return a verdict of acquittal? In such a case, is a Judge to direct the Jury to violate their oaths? There can be no difference in this respect between the duty of a Judge acting as a Jury and that of a Juror. A Judge would advise a Jury that it would be unsafe to act upon, in other words, to believe, the uncorroborated evidence of an accomplice, as he would advise the Jury not to act upon the evidence of any other witness whose evidence might from any cause, be open to suspicion; but in either case, he would have to tell the Jury that if they believed the evidence, they might legally convict the prisoner. Confusion on this question has sometimes arisen from overlooking the distinction between a caution to be

1. (1894) 2 Q. B. 415 at p. 418. 2. (1887) I. L. R. 9 A. 528 at p. 554.

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given to a Jury and a direction on law. The questions of fact are for the Jury to find on the evidence. On questions of law the Jury must accept the direction of the Judge. Similarly, a Judge when trying a case without a Jury must, as a Juror, come to a finding on the facts, and, as a Judge, direct himself upon the law. I do not think that it has ever been suggested that the advice of a Judge to a Jury not to act upon the uncorroborated evidence of an accomplice is a direction on law."

In our opinion the law and practice were correctly laid down by this Court in *Reg.* v. *Ramasami Padayachi*[1]. "Though the tainted evidence of an accomplice should be carefully scanned and received with caution and may be treated as unworthy of credit, yet, if the Jury in the one case or the Court in the other, credits the evidence, a conviction proceeding upon it is not illegal." In fact to hold otherwise would be to render nugatory the express provisions of Section 133 of the Evidence Act (See the Judgment of Sir Bhashyam Aiyangar J. in *Ramasami Goundan* v. *Emperor*.[2]

Although in our opinion in the case before us it would be open to us to convict on the uncorroborated evidence of the informers, even if it stood alone, if we were satisfied that that evidence was true, it is of course of the utmost importance to consider whether the evidence which is relied upon by the Crown really corroborates that evidence or, in other words, whether it establishes facts which go to show that the evidence of the informers is true.

As to the character of the corroborative evidence which may lead the Court to believe that the evidence of an informer is true that must depend entirely upon the nature of the charge and the facts of the particular case. It is clear that oral testimony of independent witnesses is not necessary, but it seems impossible to lay down any hard and fast rule. The illustration to section 114 uses the words "in material particulars", but what are material particulars must depend upon the particular case. Section 156 of the Evidence Act, read with the illustration, has a very direct bearing upon this question. The illustration is as follows:—"A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed. Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself." As Lord Coleridge observed in *Reg* v. *Ghalagher*.[3] "With regard to the

1. (1878) I.L.R. 1 M. 394. 2. (1903) I.L.R. 27 M. 271 at p. 290.
3. (1875) 15 Cox Criminal Cases at p. 318.

amount of corroboration it was not necessary that an informer should be corroborated in every particular, because if it were possible to give such corroborative evidence it would hardly be necessary to call the approver, but there must be a certain amount of confirmation sufficient to satisfy the Jury." Numerous authorities have been cited before us but we do not know that they afford us much assistance. We cannot help thinking that there has been a certain amount of confusion between the question of the admissibility of evidence tendered as corroborative testimony and the weight to be attached to it. For instance the defence relied on *Reg.* v. *Malapabin Kapana*[1] where it was held that previous statements of an accomplice cannot be regarded as corroborative of evidence given by him at the trial. See, too, *Queen Empress* v. *Bepin Biswas*.[2] There are also other decisions and statements in the text books to the same effect. If this is intended as a proposition of law we cannot accede to it, though as a proposition of fact, with reference to the facts of the particular case before the Court, it may have been indisputable.

In addition to the oral testimony of independent witnesses and the documentary evidence in the case which will be considered later, the Crown relies on certain facts as corroboration of the evidence of the informers. Among these are the fact that certain statements were made by the approvers Arumugam and Somasundaram to R. Veeraraghava Iyer (P. W. 31), and Inspector of Police attached to the C. I. D., statements which were substantially in accordance with his evidence before this Court. The witnesses themselves speak to having made these statements but that of course carries the case no further. They are also spoken to by Inspector Veeraraghava Iyer. It was contended that the evidence as to the making of these statements was not admissible, and that, if it was, it did not corroborate the evidence of Arumugam given at the trial. The grounds on which it was argued that evidence of the statements made by Arumugam was inadmissible were as follows:—

(a) The statements did not come within the purview of section 157 of the Evidence Act since they were not made before an authority legally competent to investigate the fact to which the statement relates.

(b) The statements were confessions made to a Police Officer and under section 25 of the Evidence Act could not be given in evidence.

1. (1874) 11 Bom. H.C.R. 196.

2. (1884) I.L.R. 10 C. 970.

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(c) The statements were made to a Police Officer and, under section 162 of the Code of Criminal Procedure, could not be given in evidence.

As regards (a) the Officer to whom the statements were made is an Inspector of the Provincial Criminal Investigation Department, a department created " to assist in the investigation of crimes which are of such a special character that local officers are unable to deal with them adequately without help" G. O. (No. 913 Judicial, dated July 2nd, 1908.)

Inspector Veeraraghava Iyer's name was not mentioned by the Deputy Inspector-General of Police as one of the officers directing the investigation (p. 4.) The evidence is that when the statement was made he had been sent to Tuticorin for a specific purpose *viz.*, to search certain houses. Veeraraghava Iyer stated in this evidence that he was assisting the Deputy Inspector-General and acting under his orders and that the statement was made to him when he was acting under orders. It was contended that the Inspector was not an "authority legally competent to investigate" since he was not empowered to " investigate" under the provisions of the Code of Criminal Procedure. The law of this country as enacted in section 157 of the Evidence Act differs from the law of England. The principle of the section is that consistency is a ground for belief in a witness's veracity. The words " before any authority legally competent to investigate the fact" are quite general and we see no reason why they should be restricted to police officers and to " investigations" in the technical sense in which the word is used in the Code of Criminal Procedure. The words are "competent to investigate", not a case, but " *the* fact." Further we do not think the words " legally competent" mean only competent under some express provision of law. The competency of the authority for the purpose of the section appears to us to be a question of fact, or at any rate a mixed question of law and fact to be determined with reference to the facts of the particular case. On the evidence we are prepared to hold that Inspector Veeraraghava Iyer was an " authority legally competent to investigate the fact" within the meaning of section 157 of the Evidence Act. Even if this question has to be determined with reference to the provisions of the Code of Criminal Procedure we think the Inspector was legally competent to investigate. Investigation is defined (section 4 (1) of the Code of Criminal Procedure) as *including* " all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate)

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who is authorised by a Magistrate in this behalf." Section 156 empowers an officer in charge of a Police Station to "investigate" without the order of a Magistrate. Section 551 empowers police officers superior in rank to an officer in charge of a Police Station to exercise the same powers, throughout the local area to which they are appointed as may be exercised by an officer in charge of a police station within the limits of his station. There can be no question that the Inspector is a police officer superior in rank to an officer in charge of a police station. *Prima facie* therefore he has power to investigate in case to which section 156 applies. As a member of the Provincial Department of Criminal Investigation his "local area" is the Presidency of Madras. The fact, if it be a fact, that there is no formal order appointing him to the Presidency of Madras as his "local area" does not in our opinion, prevent him from exercising the powers conferred by the section.

As regards (*b*)—the objection under section 25 of the Evidence Act,—as we intimated in the course of the trial, in the opinion of the majority of the Court, this objection fails. Our attention was not called to any authority upon the point, but it was argued that the words of the section were general and not restricted, as in section 26, to the party who makes the confession. As regards the 'mischief' of the two sections there seems no good reason why the suggested distinction should be drawn. No doubt Arumugam's statement to Inspector Veeraraghava Iyer inculpated himself, but Arumugam is not now an accused person and does not stand charged before us. It is not sought to use the statement against him in any way. It is sought to use the fact that he made the statement in the circumstances in which it was made as a fact which goes to show that his evidence at the trial was true. In *Queen Empress* v. *Tribhovan Manekchand.*[1] West J. observed "'confession' in Section 25 of the Indian Evidence Act I of 1872 means, as in section 24, a 'confession made by an accused person' which it is proposed to prove against him to establish an offence." We do not think we are precluded by Section 25 from admitting evidence of the statement as evidence of a fact which goes to show that the testimony of Arumugam at the trial was true. The question of the weight of this evidence is, of course, a different matter.

Evidence of the statement made by Somasundaram to the Inspector may be of less weight than the evidence of Arumugam's

1. (1884) I. L. R. 9 B. 131 at p. 134.

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statement. But, for the reasons we have stated, we think it is admissible.

As to (*c*), the objection that under section 162 of the Code of Criminal Procedure the evidence is inadmissible, we think this objection also fails.

The section is perhaps not very artistically drawn but its meaning, as it seems to us, is clear. It means that the written record of a statement made to a police officer in the course of an investigation shall not be used as evidence. It may be that the object of the section is easily frustrated by the police officer repeating his written record from memory and relying solely on his memory of the written record for the purpose of giving evidence. But we are not concerned with this. All we are concerned with is the construction of the section, and, as a question of construction, it seems to us that for the purposes of this section using as evidence means putting in the written record as documentary evidence in the case. It was contended that this construction would lead to hardship since although the proviso provided means, by the use of the written statement, of discrediting a witness who spoke to the facts of the case, it provided no means of discrediting a witness who was called to prove that another witness had said the same thing on a previous occasion. There may or may not be some force in this criticism, but we should not be warranted in straining the language of the section so as to avoid a possible hardship.

As pointed out in *Fanindranath Banerjee* v. *Emperor*[1] in section 162 of the Code of Criminal Procedure as it now stands, a distinction is drawn between the statement and the writing. The Calcutta case is no doubt not on all fours with the present case, because there was no writing, but in view of the plain language of the section, we are of opinion that oral evidence of the statement is admissible whether the police officer took it down in writing or not. As regards the case of *Rustam* v. *King-Emperor*[2] in which two Judges differed on this question we need only say that we agree with the judgment of Karamat Husain J. and the reasoning on which it is based. We think the legal objections to the admissibility of the evidence of these statements fail, and that the statements are admissible under section 157 of the Evidence Act as corroborative evidence in this case. The weight of the evidence is, of course, another question. We consider this later on.

1. (1908) I. L. R. 36 C. 281 at p. 285. 2. (1910) 7 A. L. J. 468.

As corroborating the evidence of the two informers Arumugam and Somasundaram, the Crown also relies on the statements made by Neelakantam, the 1st accused, which were recorded as confessions (Exhibits AAAA and AAAA-1) in the case as being confessions which under section 30 of the Evidence Act may be taken into consideration against the persons who have been tried jointly with Neelakantam. The first statement (Exhibit AAAA-1) was made to the Sub-Divisional Magistrate on July 12 and the second statement on July 14, 1911. The first statement purports to give an account of Neelakantam's life since 1903 up to the time of his arrest. The second statement (Exhibit AAAA) is in these terms :—

Q.—You asked this Court on the 12th at the close of your statement before it, for permission to come up before it again in two days' time to say something more about yourself. Do you wish to say anything ?

A.—Yes, I do. I want entirely to unburden my mind. If any persons are to be punished for what I say, I should be the first among them, but I believe I am innocent. When I was in Tenkasi in May 1910, I sent Sankarakrishnan to bring Vande Mataram Subramania Iyer from Ettiyapuram, and K. V. Arumugam Pillai from Tuticorin. They came and in Chidambaram Pillay's house we formed a society, and undertook by an oath that each of us would devote his life and property to the cause of the country. We offered puja to the mother Kali, and then we wrote the conditions of our vow on a piece of paper, which we signed. We then cut our thumbs, and put our thumb-marks on the paper in our blood. This was to create some awe in the minds of the members.

Q.—Did Chidambaram Pillay sign it too ?

A.—Yes he also signed. I have something more to say about Tuticorin. I went there as I have said before from Tenkasi. Sankarakrishnan came there in advance of me. We formed a similar society there. We took a similar vow, and signed a paper, and put our thumb impressions in blood. Myself, Sankarakrishnan, Arumugam Pillay, Madasami Pillay of Ottapidaram, one Sankaralingam of Tuticorin, Somasundaram Pillay of Tuticorin signed. We did not clearly state what the purpose of the society was. I myself was not clear about it. I did not teach anything to these people. Then I went to Courtallam, where I met Veerabhadra Sarma, who gave me definite views about the reformation of the country. I did not start any society either with Vanchi

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or with the Shencottah people, nor did I teach against Government any hostile views to the Shencottah people. I went to my native place, and never mentioned anything about the society to any of my acquaintances either in Tinnevelly or in other places. I do not know what these people did after I went to Madras. This is all true, and I have not hidden anything.

At the trial Neelakantam made a statement to the Court. With reference to the two statements made to the Magistrate he said "The next day after I reached Tinnevelly *i. e.*. the 12th July I made a voluntary statement before the Committing Magistrate. The events recorded in that statement as well as my statement before the Deputy Commissioner at Calcutta are perfectly true. But, a day after that, *i. e.*, the 14th of July, I was compelled to make another statement before Mr. Tampoe in consequence of a threatening piece of information I received from a responsible police officer. I was given to understand that Arumugam had made a statement to the effect that two oath meetings were held at Tenkasi and at Tuticorin when I had been to these places, and that the only way for my escape was by my turning an approver by corroborating Arumugam's evidence and by implicating myself with some others who are not charged in this case in a similar meeting at a different place, and thereby throwing off my responsibility in the Tenkasi and the Tuticorin affair. Besides, I was kept separate from the rest of the prisoners from the very day I was taken to Tinnevelly and consequently I was unable to understand what the case was about, and how many were arrested, and in what connections. I was naturally in a state of fear and bewilderment from the time I heard of Arumugam's statement and believed what all was said to me. I went thus far in my second statement marked Exhibit AAAA and beyond that I was unable to say anything and I stopped. I deeply regret my weakness in attempting to say a falsehood for the purpose of saving my skin. The detailed incidents relating to the cause of my statement of the 14th of July, and the foolish manner in which I gave way to the threatening and inducement are all so very painful and shameful for me to relate that I do not want to record them here. But, I merely declare that the information contained in my statement of the 14th of July are all false and that I did not make the statement of my own free will."

There is not a shred of evidence to show, and we see no reason to think, that the second statement was made under pressure from the Police. It may no doubt be said that reading the two

statements and the retractation together it was Neelakantam's intention to implicate himself and the others whose names he mentions in the second statement in the charge on which he has been jointly tried with them.

Mr. Napier contended that if these statements had been made to a Police Officer they would have been inadmissible under section 25 of the Indian Evidence Act as against the person making them, and that if they would have been inadmissible under Section 25 as amounting to a 'confession', they can be 'taken into consideration,' as amounting to a 'confession,' under section 30. We should hesitate before adopting the view which has been taken in some of the reported cases (See, for instance *Empress of India* v. *Ganraj*,[1] and *Queen Empress* v. *Jagrup*[2] that the confession before it can be taken into consideration under Section 30 must be sufficient, if it stood alone, to justify the conviction of the party making it. It seems to us that the question of the admissibility of these statements under section 30 as against the persons who have been tried jointly with Neelakantam, is so doubtful, and their value against such persons, even if they are admissible, is so slight that as against these persons we ought to exclude them from consideration.

As we have already stated, evidence of the statements made by Arumugam and Somasundram to Inspector Veeraraghava Iyer is in our opinion admissible. A point of the utmost importance in judging of the truth of the evidence of these two witnesses is the circumstances in which their first statements were made.

Then their Lordships dealt with the evidence.

As regards the 2nd count of the indictment all the accused are acquitted.

As regards the 1st count we acquit Desika Charri (the 9th accused), Vembu Aiyar (the 10th accused), Chavadi Arunachalam Pillai (the 11th accused), Alagappa Pillai (the 12th accused), Vandematharam Subramania Aiyar (the 13th accused). We convict Neelakantam *alias* Brahmachari (the 1st accused), Sankarakrishna Aiyar (the 2nd accused), Madathukadai Chidambaram Pillai (the 3rd accused), Muthukumarasawmy Pillai (the 4th accused), Subbayya Pillai (the 5th accused), Jagannatha Aiyangar (the 6th accused), Harihara Aiyar (the 7th accused), Bapu Pillai (the 8th accused), and Pichumani Aiyar (the 14th accused).

1. (1879) I. L. R. 2. All. 444. 2. (1885) I. L. R. 7. All. 646.

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Sankaran Nair, J:—His Lordship after dealing with the history of the case proceeded as follows:—

I have already stated the prosecution case as disclosed by the evidence. It rests really upon the evidence of the three accomplices who have been granted pardon by the local Government on condition of their speaking the whole truth. Against some of the accused there is no corroboration of the approvers' evidence. Against others there is some kind of corroboration. It is strenuously contended on behalf of the defence that their evidence should not be accepted without corroboration in material particulars, and that such corroboration is wanting in this case. On the other hand, the Public Prosecutor contends that it is unnecessary to insist upon such corroboration and that these approvers must be treated like any other witnesses coming before the courts and their evidence believed or disbelieved according to the circumstances of each case. Section 133 of the Evidence Act (omitting certain words which are unnecessary) runs thus " A conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." Section 114 illustration (b) is this: "the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars" and to this illustration there are certain exceptions pointed out which may be referred to later. Both sides have referred to the English law of evidence on this point. All the earlier cases are fully discussed by Sir Barnes Peacock in *Elahee Buksh's* [1] case and the later authorities are discussed in *Queen Empress* v. *Maganlal*, [2] and *Queen Empress* v. *Chagan Dayaram*, [3] and by my learned brother Abdur Rahim J. in *Vyasa Rao* v. *Emperor*,[4] I shall only refer to two or three cases to illustrate the sections. In *Reg* v. *Boyes* [5] Martin B. has thus commented upon the evidence of an accomplice in summing up (p. 34) " Assume, for the purpose of the present discussion that this man was speaking the truth. Is there any law which prohibits a Jury from believing a man who (it must be assumed for the sake of the argument) spoke the truth simply because he is not corroborated? I know of none. I know of no rule of law myself......".

This is really section 133 of the Indian Evidence Act.

Then Martin B goes on "but there is a rule a practice which has become so hollowed as to be deserving of respect: I believe these are the very words of Lord Abinger, it deserves to have all the reverence of the law".

1. 5. W. R. Crl. Rulings p. 80.
2. (1889) I. L. R. 14. Bom. 115.
3. (1890) I. L. R. 14. B. 331.
4. (1911) 21. M. L. J. 283.
5. (1861) 9. Cox's Criminal cases p. 32.

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This is in effect as I shall point out later really section 114 illustration (*b*). Similarly Cockburn, C. J. in the same case in the course of the argument said at page 35 " I protest against its being the duty of the Judge to direct the Jury to acquit because the evidence of an accomplice is uncorroborated".—This again is section 133. But in delivering the Judgment of the Court he stated both the rule of law and the practice. He said at page 36 " it is stated very well in Taylor on Evidence, p. 796, 'The degree of credit which ought to be given to the testimony of an accomplice is a matter exclusively within the province of the Jury. It has sometimes been said they ought not to believe him unless his evidence is corroborated by other evidence, and without doubt great caution in weighing such testimony is dictated by prudence and reason. But no positive rule of law exists upon the subject, and the Jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement. It is true that Judges in their discretion will advise a Jury not to convict a prisoner upon the testimony of an accomplice alone, and without corroboration, and the practice of giving such advice is now so general that its omission would be deemed a neglect of duty on the part of the Judge. Considering too the respect which is a always paid by the Jury to this advice from the Bench, it may be regarded as the settled course of practice not to convict a prisoner, ***except under very special circumstances.*** (The italics are mine) upon the sole and uncorroborated testimony of an accomplice. The Judges do not in such cases, withdraw the case from the Jury by positive directions to acquit, but only advise them not to give credit to the testimony'. I think that is a fair exposition of what the present practice is. We think that he ought not to have told the Jury to acquit if the witness was uncorroborated". Here again he states the law as laid down in section 133 *and* illustration (*b*) to section 114.

Similarly in *Reg.* v. *Gallagher and others*[1] the law is laid down in the same terms. Lord Coleridge L. C. J. states (p. 318) " There was no doubt that the law, as very many generations of lawyers had always laid down in the same way—whether it was most convenient, it was not for him to say, but he only repeated the language of those who had sat on that seat before him in laying it down again—that there was no reason why the evidence of an approver should not be acted upon by a Jury if they thought it true, because the Jury were to be satisfied of the truth of the matters proved

1. (1875) 15 Cox. Criminal Cases 291.

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before them and stated in evidence, and if from the evidence of the approver himself they were perfectly satisfied that he was speaking the truth, then there was no reason in point of law why on his evidence they should not act and find the accused guilty.

This again is section 133, The Lord Chief Justice goes on "But it had been usual, for Judges always to recommend that there should be some corroboration of the evidence given by an informer. The danger of acting upon the uncorrborated statement of an informer was obvious and the wisdom of requiring that some corroborative evidence should be given before such statements are acted upon was perfectly apparent to an intelligent mind. The law was as he had stated but the practice was always to require corrboration".

This again is illustration (b) to section 114.

I will only quote two more cases. *In re Meunier*,[1] Cave, J. says "it is not the law that a prisoner must necessarily be acquitted in the absence of corroborative evidence; for the evidence must be laid before the Jury in each case" (c. f. section 133). "No doubt it is the practice to warn the Jury that they ought not to convict unless they think that the evidence of the accomplice is corroborated" (c. f. illustration (*b*) to section 114).

In another case, *Rex*.v. *Tate*[2] Lord Alverstone the Lord Chief Justice, states (p. 682) "In Taylor on Evidence, 10th Edition, p. 688, the practice is thus stated 'Judges...in their discretion, generally advise a Jury not to convict a prisoner upon the testimony of an accomplice alone; and although the adoption of this practice will not be enforced by a Court of Review, its omission will, in most cases, be deemed a neglect of duty on the part of a Judge. Considering too the respect which is always paid by the Jury to such advice from the Bench it may be regarded as the settled course of practice not to convict a prisoner, *excepting under very special circumstances* (the italics are mine) upon the uncorroborated testimony of an accomplice'. That appears to me to be a correct statement of the practice. And in Russell on Crimes, 6th Edition, Vol. III p. 646, it is said that although the pratice in strictness rests only upon the discretion of the Judge at the trial, "it may be observed that the practice in question has obtained so much sanction from legal authority that it, deserves all the reverence of law', and a deviation from it in any particular case would be justly considered of questionable propriety".

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1. (1894) 2 Q. B. 415 at p. 418
2. (1908) 2 K. B. 680.

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"In the present case, the Judge did not direct the Jury in accordance with the settled practice, but told them that the question for them was which of the two witnesses they believed, the boy or the prisoner thereby leading them to suppose that if they believed the accomplice's story they might properly convict although his evidence was entirely without corroboration. Under these circumstances, we are of opinion that there has been a miscarriage of justice, and that the conviction should be set aside."

"It will be observed here that though he refers to the Judgment of Cave, J, who according to him did not state the law too strongly, he cites both from Taylor and from Russel only the extracts dealing with the practice omitting altogether what they state to be the rule of law, and sets aside a conviction by a Jury although they believed the story of the accomplice on the ground that his evidence was entirely without corroboration, and that the Judge did not direct the Jury in accordance with the practice as set out by Taylor and Russell. It is clear therefore that according to the learned Chief Justice the attention of the Jury must first be drawn to the presumption of the unreliability of an accomplice's evidence and it is only if they find that even, with such presumption against such witness's credibility they believed him, they are entitled to convict, or in other words the circumstances must be such as to rebut that presumption.

The presumption must first be drawn that the evidence is untrustworthy. All the Courts are agreed that a conviction by a jury on the uncorroborated testimony when the Judge has not cautioned them against accepting it must be set aside. If therefore a case cannot be left to the jury without such direction, it seems to follow that this presumption must be raised.

In the latest case, *Rex* v. *Everest*, 73 Justice of the Peace Reports 269 at p. 271 Darling, J. said that "it was long ago established that a Judge should direct a Jury to acquit if the evidence against the accused is that of a person put forward as an accomplice and his evidence is not corroborated in some material particulars". The learned Judge here apparently goes beyond what the text writers and the previous Judges stated as a rule of law that the evidence should be left to the Jury.

As to the text writers, Taylor on Evidence and Russel on Crimes have been already referred to. I shall refer only to one more text writer, Best on Evidence. In the 10th Edition, paragraph 171, it is stated "although with strictness a Jury may legally...... ......convict on the unsupported evidence of an accomplice or

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socius criminis, yet it is a rule of general and usual practice—now so generally followed as almost to have all the force of law—for the Judge to advise the Jury not to convict on the evidence of an accomplice *alone*". It appears to me that these authorities place it beyond doubt that in England the law may be taken to be what is stated in Taylor's book which three L. C. Js. Cockburn L. C. J., Coleridge L. C. J., and Alverstone L. C. J. declare to be a correct statement of the practice that a prisoner is not to be convicted "*except under very special circumstances upon the uncorroborated testimony of an accomplice.*"

If he is convicted by a Jury for presumably exceptional reasons, then the conviction is not for that reason illegal.

In this country we are however governed by the Indian Evidence Act, and though it is stated by Sir James Stephen in his introduction (p. 2) quoting from the Report of the Select Committee that " it is little more than an attempt to reduce the English Law of Evidence to the form of express propositions arranged in their natural order, with some modifications rendered necessary by the peculiar circumstances of India", we are not entitled to assume the English Law of evidence and then to enquire what modifications have been introduced into it; but we have to follow the provisions of that act with reference to the matters therein provided for.

I shall briefly refer to a few of the decisions cited to see whether the question has been finally settled and whether it is open to us for discussion.

The leading case in India which was decided however before the Evidence Act is what is usually called *Elahee Buksh's*[1] case, Sir Barnes Peacock reviewed all the English and Indian cases and declared the law as laid down in the English cases. This was however before the Evidence Act. It has been generally assumed that these rules have now been embodied in the Evidence Act. The law as laid down therein has accordingly been followed after the Evidence Act came into operation in Calcutta. See *Kamala Prasad* v. *Sital, Prasad.*[2] *Jamiruddi Masalli* v. *Emperor*[3], *Deo. Nandan Pershad* v. *Emperor*[4], and *Emperor* v. *Lalit Mohan Chuckerbutty and others.*[5]

The provisions of that Act are fully discussed in *the Queen* v. *Sadhu Mandul*[6] and the result is thus stated by Phear, J (p. 70)

1. (1866) 5. W. R. Crl. R. 80. 2. (1901) I.L.R. 28. C. 339. at p. 342 & 345.
3. (1902) I.L.R. 29 C. 782 at p. 787. 4. (1906) I. L. R. 33 C. 649.
5. (1911) I. L. R. 38 C. 569. 6. (1874) 21. W. R. Crl. Rulings p. 69.

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"On the whole the result appears to be that the legislature has laid it down as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person, that in so far as his testimony implicates an accused person unless he is corroborated in material particulars in respect to that person; that it is the duty of the court which in any particular case has to deal with an accomplice's testimony to consider, whether this maxim applies to exclude that testimony or not; in other words, to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though at the same time the court may rightly in exceptional cases, notwithstanding the maxim and in the absence of this corroboration give credit to the accomplice's testimony against the accused, if it sees good reason for doing so upon grounds other than, so to speak, the personal corroboration" or in other words, the evidence of an accomplice is to be believed only "in exceptional cases".

In Bombay also, the law has been laid down in the same terms. In *Queen Empress* v. *Chagan Dayaram*[1] Mr. Justice Jardine states the law in the following terms:—He says (p. 344) "as pointed out by Bayley, J., in *Magan Lal's* case the courts must give proper effect to the long experience of the ways of rogues embodied in section 114 illustration (b) of the Indian Evidence Act. The rule in section 114 and that in section 133 are part of one subject and both are found in most of the great judgments mentioned in our judgments in that case.; and neither section is to be ignored in the exercise of judicial discretion. The illustration (b) is, however, the rule, and when it is departed from, I think the court should show, or that it should appear, that the circumstances justify the exceptional treatment of the case. As I said *in Queen Empress* v. *Magan Lal*[2] it has been held by two eminent Judges now Members of the Judicial Committee of the Privy Council that it would certainly be unsafe to depart in India from the established practice of England in the application of the rule requiring corroboration. These are the words of Couch C. J., in *Reg* v. *Imam*[3] and they pervade Sir Barnes Peacock's decision in *Elahee Buksh's case.* It is not enough for a court to state the rule *pro forma* and merely as a reason to evade it; the courts must act up to it." Mr. Justice Birdwood also citing Phillips Treatise on the Law of Evidence, Vol. I., p. 95, states the law in nearly the same terms. This case was followed in *King Emperor* v. *Mahlar MartandKulkarni.*[4]

1. (1890) I. L. R. 14 B. 331.
2. (1889) I.L.R. 14 B. 115 at p. 128.
3. (1867) 3. Bom. H. C. R. 59. Crown Cases.
4. (1901) I. L. R. 26. B. 193.

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Or, in other words, the law laid down is the same as in Calcutta that the presumption is that the evidence is unreliable and exceptional circumstances must be proved to justify its acceptance.

In a case reported in *Queen Empress* v. *Ram Saran*[1] the learned Judge Straight, J. discusses the effect of a conviction based on the evidence of an accomplice and holds that the law as laid down in sections 133 and 114 of the Evidence Act is in no respect different from the law of England. He states that it simply reproduces a rule of practice which the English Courts have recognised and which their tendency has of late been see the case referred to in 73 Justice of the Peace Reports 271—to apply—*Rex* v. *Everest*[2] with great strictness. The English cases are therein referred to and discussed. The law as herein laid down is followed by the Chief Justice of that Court in another case, *Queen Empress* v. *Imdad Khan*[3] and the same learned Judge Mr. Justice Straight as Chief Justice adheres to that rule as laid down before in a case, *Queen Empress* v. *Baldeo.*[4] In a subsequent volume, *Queen Empress* v. *Gobardhan,*[5] Sir John Edge at p. 554 also lays down the law substantially in the same terms. He lays down that there is no rule of law that a conviction cannot be based upon the evidence of an accomplice; this is section 133 Evidence Act, but it is "most unsafe" as a general case to convict on his uncorroborated evidence, hence the presumption that arises according to Section 114 illustration (b), but "if a Judge after making due allowance for the considerations which make it unsafe to accept the evidence of an accomplice resolved to convict him then that conviction should not be disturbed" that is, first, you had to presume that the witness is unreliable and then you have to see whether there are circumstances which justify the court in disregarding the presumption in that particular case.

In Madras, the earliest case brought to our notice after the passing of the Evidence Act is reported in *Reg* v. *Ramasami Padayachi,*[6] where the Indian Law is stated after a consideration of the provisions of the Evidence Act in the same terms as the English Law. In *Ramasami Goundan* v. *Emperor*[7] Boddam J. also arrived at the conclusion that the Indian Law and the English Law were the same and went so far as to say that it would be the duty of the Judge to direct a jury that there was not sufficient evidence before them if they had only the evidence of an ac-

1. (1885) I. L. R. 8. All. 306 at p. 310.
2. [illegible]
3. (1885) I. L. R. 8. All. 120 at p. 138.
4. (1886) I. L. R. 8. All. 509.
5. (1887) I. L. R. 9. All. 528.
6. (1878) I. L. R. 1. Mad 394.
7. (1903) I. L. R. 27. Mad. 271.

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complice upon which they would be justified in finding an accused guilty. From this latter statement, Bhashyam Aiyangar J. dissented. He says " it may be that except under very special circumstances the settled course of practice is not to convict a prisoner upon the sole and uncorroborated testimony of an accomplice and if, in the opinion of the Judge, there are no special circumstances which would induce him to give credit to the evidence of the accomplice and convict the prisoner on his sole uncorroborated testimony he may no doubt under section 298 of the Criminal Procedure Code express such opinion to the jury and in that sense to advise them to acquit the prisoner." Or, as I understand him, he takes the same view as in all the cases above referred to. His observations as to the officials who take bribes availing themselves of this section to escape punishment may be safely disregarded as almost every rule of evidence which is intended to protect the innocent is availed of by guilty persons to escape the punishment which they justly merit. Subramania Iyer J. quotes that portion of the observations of Martin J. and of Cockburn C. J. in *Reg.* v. *Boys*[1] which are dealt with by Section 133 and states that the rule that the evidence of an accomplice requires corroboration is not a rule of law but a rule of general and usual practice and the application of it is for the discretion of the Judge by whom the case is tried. In so far as the learned judge states that the rule is one of general and usual practice, it is in accordance with all the authorities. If the learned judge means that the judge need not advise a jury for instance, that ordinarily the evidence of an accomplice, should not be accepted unless corroborated and that a judge trying a case need not start with that presumption, then with all respect to him, it is clearly wrong, according to all the cases cited above. I have not been able to find any judge laying down the rule in those terms. But if he only means that though that is the presumption it is open to the judge to find that the special circumstances of that case rebut the presumption, then according to my view of law he is right. It is not argued before us that there is any rule of law that the evidence of an accomplice must be discredited but the argument is confined, as I understand it, to what is stated to be the law by the English Judges that it is " most unsafe to convict on the evidence of an accomplice without material corroboration and that the Court must be satisfied that special reasons exist in the case to accept such tainted testimony without such corroborations,"

1. (1861) 9. Cox Criminal Cases 32.

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In *Vyasa Rao* v. *Emperor*[1] Mr. Justice Abdur Rahim reviewed all the decisions of the English Courts and stated the law in the terms it was stated in *Rex.* v. *Tate*,[2] namely "that it is the settled course of practice not to convict a person except under very special circumstances upon the uncorroborated testimony of an accomplice" and as there were no exceptional circumstances in that case he set aside the conviction. I entirely concur with him in that judgment. It was however a case in which the revisionary jurisdiction of the High Court was invoked and Ayling J. declined to interfere as the credibility of the witness is ultimately one of fact.

20. But we have been invited by the learned Public Prosecutor to consider the Evidence Act itself which he contends supports his contention.

By section 2 of the Evidence Act all rules of evidence contained in any Act are repealed. In so far therefore, as the law about the credibility of the evidence of an accomplice is a rule of evidence, that is abolished.

Under section 18 all persons with certain exceptions to which it is not here necessary to refer are competent. to testify. An accomplice is therefore competent to testify. This is further declared by section 133 in express terms. That section states also that "a conviction is not illegal merely because it proceeds from the uncorroborated testimony of an accomplice." This is strictly in accordance, as I have already pointed out, with the English rule as stated in Taylor's book. But such a provision in section 133 was unnecessary if the evidence of an accomplice stood on the same footing as that of any other witness. The distinction is pointed out in section 114. It states that the courts may presume the existence of any fact regard being had to the common course of natural events and the illustration (b) to the section is that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. This section is intended to get rid of any artificial rules of the effect of evidence, and to give them the effect of presumptions or maxims; all rules of evidence which are not statutory having been abolished by section 2. The illustrations here given are for the most part such rules of evidence as are treated as presumptions of law; the Act converts them into maxims or presumptions to be drawn by the court. I will take some of these illustrations to see how far it is open to a court to disregard them. To take the 1st illustration: the court may presume that a man who is in possession of stolen goods soon

1. (1911) 21 M. L. J. 283. 2. (1908) K. B. 680 at p. 682.

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after the theft is either the thief or is the receiver of the goods knowing that it was stolen unless he can account for their possession. Now it is clear ordinarily that every Court is bound to act on this presumption. The possessor has to account for his possession. But, it is also clear that there may be exceptions as the instance of the shop-keeper referred to in the section. But the shop-keeper has to prove the fact that he is continuously receiving these Rupees in the course of his business. The presumption in illustration (c) has been since made the subject of special enactment and all the other illustrations are cases in which the courts, save in exceptional instances, are bound first to draw the presumption as indicated by the section. Failure to draw such presumptions without adequate grounds being shown has also been a ground for interference by a superior court. Similarly, in the case of an accomplice also, the same section 114 refers to two instances where "very special circumstances" exist for believing an accomplice. In the last exception to the illustration both the accomplices must be proved to be men of the highest character, and that the offence does not import any stain on moral character or truthfulness. In the 2nd exception to the illustration the practical impossibility of three accomplices not having any means of communication with one another telling the same story is a guarantee of its truth. That they had no opportunity for communication with one another has to be proved. Be it noted that both are treated as instances where the evidence of an accomplice might be accepted without corroboration, not as cases of corroboration of one accomplice by another. Other instances might be easily multiplied. If we keep before us the reasons for not accepting an accomplice's evidence, it is not difficult to apply the rule. An accomplice by admitting his complicity in a crime admits his infamous character. He does not redeem it by betraying those who trusted him. He is a man who usually tries to throw the burden of the guilt on others as much as possible. He knows generally that if his evidence is not accepted and the accused convicted, he himself stands a chance of trial and conviction. The strength of the presumption will be weakened in each case according to the extent these considerations are not shown to operate. It will thus depend upon the facts of each case. An Englishman, for instance, when threatened by a constable in India with detention in jail, where he knows he will not be treated with any severity, bribes the policeman, is in a very different position, so far as his character is concerned, from a caste Hindu youth who apprehends violent treatment, and to whom such incarceration might mean civil death.

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The evidence in the one case has to be received with very great caution. Similarly, a man who is already convicted for his offence and undergone his sentence has not much to fear from the future consequences. His evidence need not be disregarded on that ground.

The law is the same as in England and is rightly in my opinion laid down in the Indian cases. My conclusions therefore are that:—

(1) The question is not whether a conviction based on the uncorroborated testimony of an accomplice is legal but whether there is a presumption that such testimony cannot be accepted without corroboration;

(2) a person should not be convicted except under "very special circumstances" upon the uncorroborated testimony of an accomplice;

(3) The "special circumstances" are that the grounds on which an accomplice's evidence has been held to be untrustworthy did not either exist in the case or did not exist in their full strength; that there are countervailing considerations of greater weight which diminish or entirely get rid of the weight due to such presumptions;

(4) In cases tried by a jury, a jury has to be advised by the Judge of what I have above referred to.

21. As regards the nature of the corroboration which is required, all the cases in India lay down the same rules as those adopted by the English cases. Corroboration of course is of two different kinds. There may be corroboration of the evidence as to the offence itself and corroboration as to the identity of the accused. Independent evidence might be admissible under section 156, Evidence Act, to corroborate the evidence of an accomplice about certain incidents unconnected with a robbery in which he took part. But this will not be "material particulars" under section 114 cl. (b). Further as the accomplice certainly knows all the facts of the crime, the evidence which he gives with reference to the occurrence will be no corroboration of his evidence to show that the accused took part in the occurrence. As pointed out by Baron Alderson in *Rex* v. *Wilkes and Edwards*,[1] cited in the case of *Elahee Buksh*[2] "The confirmation that is required is the confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged", or in other words, the corroboration must be of some incident which will raise an inference of

1. (1835-37) 7 C. and p. 272. 2. (1866) 5 W. R. Crl. R. 80 at p. 83.

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guilt on the *accused*. To the same effect is the decision in *Rex* v. *Imam*,[1] *Queen Empress* v. *Krishna Bhat*,[2] *Queen Empress* v. *Mohesh Biswas*,[3] *King Emperor* v. *Mohiuddin Sahib*,[4] See also *Queen Empress* v. *Baldeo*,[5] It has been already stated that when soon after the murder of Mr. Ashe, the Police Inspector went to the two accomplices they disclosed all they knew about the conspiracy. It is argued by the Public Prosecutor that these previous statements made by Arumugam Pillai and Somasundaram to the Police Inspector which is proved by the Inspector himself is corroboration of the evidence now given by them. Further after the arrest of the first accused, he made certain statements, Exhibits AAAA & AAAA1, which, it is contended by the Public Prosecutor are confessions and therefore admissible evidence to corroborate these accomplices.

22. As to the question whether the statement, Exhibt AAAA-1, made by Nilakanta may be used to corroborate the evidence of the accomplices against the other accused, reliance is first placed on section 30 of the Indian Evidence Act. Under that section, a confession made by any one person affecting himself and another person who is tried along with him may be taken into consideration 'as against such other person as well as against the person who makes such a confession'. It is necessary therefore that the statement made by Nilakanta must be a confession. There must be an admission of guilt of the person making the statement, or facts must be stated from which there may be an inference of his guilt. Neither of these conditions is complied with in the case. Nilakanta does not admit that he is guilty; and if the facts stated by him are true, even then no inference arises that he has committed any offence. I am therefore, clearly of opinion that there is no confession in the case and, if there is no confession, it cannot be taken into consideration at all against the other accused. It is unnecessary to consider the further question whether, even if it could be taken into consideration as a confession, it may be taken as corroborative evidence.

23. We have next to deal with the question whether the previous statements made by the approvers to the Police Inspector may be used as corroborative evidence. The authorities appear to me to be clear on the point that a statement by the accomplice himself or a statement by another accomplice is not the corroboration required under the rule.

1. (1867) 3 Bom. H. C. R. Crown Cases p. 57. 2. (1885) I. L. R. 10 B. 319.
3. (1873) 19 W. R. Cr. R. p. 16 at p. 20. 4. (1901) I. L. R. 25 M. 143.
5. (1886) I. L. R. 8 All. 509.

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24.. Under English Law there is no doubt on this question. In Taylor on Evidence, 10th Edition, paragraph 970, it is stated "in any case moreover in which two or more accomplices are produced as witnesses, they are not deemed to corroborate each other; but the same confirmation is required as if they were but one," and authorities are cited in support of that proposition. Of course, if one accomplice does not corroborate another in this respect, *a fortiori*, a man's own statement made on a previous occasion cannot be said to be a corroboration of the later statement for this purpose. In the *Queen Empress* v. *Mohesh Biswas* [1] Phear and Ainslee J. J. held that the corroboration, needed to make the testimony of an approver witness trustworthy, should be corroboration derived from evidence which is independent of accomplices. This case was decided in 1873—after the Indian Evidence Act. So also in *Reg* v. *Malapa Bin Kapana*,[2] the learned judges after a consideration of section 157 of the Evidence Act came to the same conclusion. This decision was followed in *Queen Empress* v. *Bepin Biswas*,[3] and they state the law in the same terms. In Allahabad the law has been laid down practically in the same terms that there must be corroboration independently of the accomplice and it makes no difference if there are two accomplices. In Madras, the same view has been acted upon though no reported decisions have been referred to us. The text writers also adopt the same view. Mr. Mayne points out that the previous statements of the same accomplice to the same effect as his sworn evidence are not corroboration by virtue of section 157 of the Evidence Act.—See paragraph 758 of the 3rd Edition. Sir Henry Shepherd who was a judge of this court in his edition of the commentaries on the Evidence Act by Sir Henry Cunningham of the Culcutta High Court also states that the evidence must proceed from an independent trustworthy source and the previous statements made by the accomplice himself though consistent with the evidence given by him at the trial is insufficient for such corroboration. The Public Prosecutor argues that section 157 of the Evidence Act itself makes it quite clear that a prior statement is a corroboration of his present statement. That may be so, and the effect of that section has already been considered by the judges in the cases referred to. It may be pointed out that what is required by section 114 is that the testimony of the accomplice must be corroborated in *material particulars* which evidently implies that his statement cannot be a corroboration. It might be equally well contended that any particular statement made

1. (1873) 19 W. R. Crl. Rulings p. 16. 2. (1874) 11 Bom. H. C. R. 196.
3. (1884) I. L. R, 10 Cal. 970.

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by a witness in one part of his deposition is supported by another statement made by him in the same deposition; whether made before or after, at any distance of time, it remains the testimony of an accomplice and all the statements together form such testimony and it is his testimony comprising all his statements that require corroboration. For instance, if it is shown that the prior statement of Arumugam Pillai is a false one in itself, then the fact that it is made is no corroboration. It is only when the previous statement is not proved to be tainted testimony that it can be used to support the present statement. That in itself is tainted testimony and subject to the same infirmities as the present one. If the prior statement had been made for instance at a time when there was no inducement, as in the present case, to make any false statement, and made under circumstances which would show that they were true, then it is possible the case might be different. Therefore looking to the words of the section, the previous statement made by a witness cannot be a corroboration of that witness himself in any material particular. The illustration to illustration (*b*) of section 114 of the Evidence Act places in my opinion the matter beyond doubt. The statement made by three accomplices are treated as an exception to what is declared by illustration (*b*) and is not given as an instance of corroboration. If the testimony of one accomplice may be taken to corroborate that of another, this illustration to illustration (*b*) is meaningless. For these reasons following the course of decisions which are uniform, I hold the previous statement made to Veeraraghava Aiyar cannot be treated as the kind of corroboration that will satisfy the conditions of illustration (*b*). But the defence pleaders go further and they contend that these statements of the approvers are not even admissible in evidence on various grounds.

25. It was first contended that this statement cannot be admitted, as section 25 of the Indian Evidence Act excludes that statement. The words of section 25 are ' no confession made to Police Officer shall be proved as against a person accused of any offence.' It is not denied that the statement in question is a confession in the sense that therein Arumugam Pillai expressly admits that he is guilty. It is also not denied that he is guilty of the offences with which the accused are charged in this case. It is not denied that Veeraraghava Aiyar to whom the confession was made is a Police Officer. And it is not further denied that it is sought to be proved against persons who are accused of various offences. All the conditions laid down in this section, it appears to

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me, are thus complied with. *Prima facie* therefore the statement appears to be inadmissible. But it is contended by the Public Prosecutor that the section only precludes its proof when it is sought to be used against the person making it, who may be accused of any offence, or, in other words, that the section should be read as meaning that no confession made to a Police Officer shall be proved as against a person making it, when he is accused of any offence. I am unable to accept the view. The section is inserted as pointed out by Sir James (then Mr.) Stephen who framed the Act to prevent torture by the Police for the purpose of extracting confessions. And the danger is all the greater when it is sought to be used not against the person making it but as against another person as the inducement not to make any false statement will be much less. I am unable to see any principle on which this contention, that a statement which is inadmissible against a person making it may be admitted against others, can be supported. It is conceded that the statement would be inadmissible against Arumugam Pillai himself to prove any offence against him, and a confession is not the less a confession, because it is sought to be used against another person. It was not the sanction of an oath or solemn affirmation. It is not against self interest as it is inadmissible against himself. The rule of public policy arising from the practices of the police which requires such a provision applies with greater force when it is sought to be used against others. The words of the section themselves are clear and other words have to be interpolated to support the opposite contention. I therefore uphold this contention.

26. It is also argued that this statement is inadmissible under section 162, Criminal Procedure Code. That section runs thus:— "No statement made by any person to a Police Officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence;

Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the court shall, on the request of the accused, refer to such writing, and may then, if the court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof; and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872."

27. It is conceded and there can be no doubt about it that the statement made by Arumugam Pillai reduced to writing

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by Veeraragava Aiyar is not admissible under the section and it is contended by Mr. Govindaragava Aiyar that if the written record of the statement is not admissible, *a fortiori* oral evidence of such statement is not admissible; and it is also contended that the defence in similar cases would be precluded from contradicting the Police Officer by the production of the original record itself when such Police Officer gives false evidence. It is argued that such a result could not have been contemplated by the legislature, and that, therefore, the oral evidence also must be held inadmissible for the reasons given by Knox. J. in *Rustam* v. *King Emperor.*[1] These objections have no doubt great weight. That a Police Officer should be allowed to depose from this memory to a statement made by a person, it may be months before, when the writing itself is declared inadmissible by the legislature on account of the untrustworthiness of the Police, may require explanation. But the words of the section are quite clear and I agree therefore with the decision in *Fanindra Nath Bannerjee* v. *Emperor,*[2] that oral evidence of what a person stated to a police witness is not precluded by section 162, Criminal Procedure Code.

28. Then another objection is taken in this case the writing was substantially used in evidence and therefore the evidence given by Veeraragava Aiyar is inadmissible. This contention is based on the following statement made by the Police Inspector Veeraraghava Aiyar.

Q.—So you looked into the note book with a view to give evidence here?

A.—I looked into the note book before I came to give evidence. As soon as I was told that I was to be examined, I referred to my note book to refresh my memory.

Q.—I take it the proof refreshing your memory that you gave was a proof from your note book?

A.—Yes.

Q.—To whom you gave the proof?

A.—Mr. Napier.

29. Now if the words of the section are to be construed strictly as meaning that it is 'the writing' along that cannot be field as evidence it would imply that a true copy taken in any form either issued by a court or by any mechanical process would be admissible. Also if a Police Officer repeats the statement word for word, sentence

1. (1910) 7 All L. J. 468. 2. (1908) I. L. R. 36 Cal. 281.

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by sentence, in court, then also such evidence would be admissible. This is a construction which, if possible, should not be adopted as it not only renders the section nugatory but aggravates the mischief which it is intended to mitigate. I do not think the words of the section compel us to that conclusion. The words 'such writing shall not be used in evidence' may fairly be construed to mean not only that such writing cannot be proved but also that secondary evidence of such writing cannot be given. But in this case it does not appear that what has been deposed to by Veeraragava Aiyar is really the contents of a written record. It is further contended that he has certainly refreshed his memory by reading the document and he has therefore substantially used that writing in evidence. I am of opinion that a police witness cannot refresh his memory by referring to his note book in the witness box because under section 161 of the Indian Evidence Act the opposite party would be entitled to inspect in that case. Under section 162, Criminal Procedure Code a Police witness is not bound to produce the note book to be inspected by the other party. The court alone is entitled to demand inspection. The provision in the Indian Evidence Act *i. e.*, section 161, must therefore give way to section 162 of the Criminal Procedure Code, and it follows therefore that a police witness cannot refer to his diary in the witness box. I agree with the judgment of Sunder Lal A. J. C. in 11 Crl. L. J. Reports 121 on this question. But in this case the witness has not referred to the diary in the witness box. If after referring to the diary outside the court, the police witness simply testifies to the facts mentioned therein not having any specific recollection of the facts themselves, (see section 160 of the Indian Evidence Act) then I am of opinion that the writing is used in evidence, because otherwise such evidence would not have come before the court and is therefore inadmissible. But in this case Veeraraghava Aiyar states that he has also independent recollection of the facts themselves, and the evidence is not therefore inadmissible on that ground. Where a witness gives his evidence from actual recollection of the facts which come to his memory on reading his diary, then he cannot be said to be using the document in evidence. I do not think therefore that this contention can be upheld.

30. It is further contended that this evidence is not admissible under section 157 of the Indian Evidence Act, because Veeraragava Aiyar was not "any authority legally competent to investigate the fact" under section 157, Criminal Procedure Code. Under section 156, it is an officer in charge of a police station who is entitled to

investigate the fact. Under section 161, it is a police officer making an investigation who may examine any person, and under section 551, Criminal Procedure Code, the powers of an officer in charge of a Police Station may be exercised by any Police Officer superior in rank to that officer within the limits of the local area of his jurisdiction. It is not denied that Veeraragava Aiyar is not an officer in charge of a police station. Leaving out of consideration for the present the Police Act of 1859, I am also of opinion that he is not an officer superior in rank to such an officer under section 551, which is evidently intended to include the Inspector, the Deputy or Assistant Superintendent, the Superintendant, the Deputy Inspector-General &c., having jurisdiction over that local area. Veeraragava Aiyar is an officer attached to the Criminal Intelligence or Investigation Department working under superior officers in that department without any defined area of jurisdiction and they have not been shown to have any power of control over a Station House Officer. The sections in Chapter XIV of the Criminal Procedure Code (See sections 154, 155, Cl. 1) contemplate information to be given to an officer in charge of a Police Station. The right to investigate cognizable cases is also given to a Police Station House Officer. (See Sections 156 and 157). The obligation to report to the Magistrate is also imposed upon the same officer. Similarly, the power to require the attendance of witnesses is also given to the same officer, and he can summon witnesses living only within the limits of his own or adjoining station. The contention of the Public Prosecutor if upheld would enable Veeraragava Aiyar who is not attached to any Police Station to summon witnesses from any place in the presidency. It is clear to me that the Police officer making an investigation referred to in sections 161 and 162 are also Station House Officers. Section 165 also gives the power to a Station House Officer or to any officer deputed by the Magistrate to investigate. When he is unable to make the search himself he may require an officer subordinate to him to make the search. It was suggested by the Public Prosecutor that as Veeraragava Aiyar has been authorised to make the search he must be taken to be an Investigation Officer. I cannot agree with this contention. The right given to him is limited *i, e.*, only to (conduct) search. It does not carry with it to do anything further, or to make an investigation generally. Sections 166 and 167, Criminal Procedure Code also contemplate the officer-in-charge of the Police Station being an investigation Officer, and section 168 states that when any subordinate Police officer has made an investigation under this chapter he shall report it to the officer in charge of the Police Station. Sections 169 and

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170 strongly support the same view. It leaves it to the officer in charge of the Police Station to report to the Magistrate whether there is sufficient evidence or reasonable ground of suspicion to justify further proceedings. Section 174 specially refers to an officer not in charge of Police Station who may be empowered to hold an inquest. These sections leave no doubt in my mind that the Police Officers entitled to investigate an offence are the Police officers referred to in the Criminal Procedure Code *i. e*, the Station House Officer or his superior officer as referred to above. All these provisions restricting the right of investigation to certain defined officers would be rendered nugatory if the contention of the Public Prosecutor is allowed.

The Criminal Procedure Code does not make him legally competent to investigate a case. It is also contended by the Public Prosecutor that by the Police Act, XXIV of 1859, section 21, the Police officers have got powers to detect crimes which implies the power to investigate, and that therefore Veeraragava Aiyar, being a Police Officer, is entitled to make the investigation under section 157. So to construe the section, would really be to nullify the provisions of the Criminal Procedure Code which, as I have pointed out, imply the power to investigate being vested in those Police Officers who have only local jurisdiction. This would give a Police Officer power to detect throughout the presidency. It is not explained whether that statutory power could be in any way limited by his superior officers. I am not able to agree to the contention that the question, whether any authority is legally competent to investigate the fact or not, is a question of fact or a mixed question of fact and law. The power to investigate must be given to him by law. I therefore disallow this contention of the Public Prosecutor. But it has been already held by the majority of the court in the course of this trial that this evidence is admissible. I shall therefore treat it as evidence.

31. Thus for I have dealt with the general rules as to corroboration and also with the question whether certain evidence put forward as such is any corroboration under section 114 (*b*) of the Evidence Act. I shall now consider how the story now told affects the usual presumption against the testimony of accomplices. It will be seen that there is no overt act alleged by the accomplices, nor does the story of the witnesses derive any support from the conduct of the alleged chief conspirator.

[His Lordship then dealt with the evidence. Editor]

On the 2nd charge I acquit all the accused.

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On the 1st charge I convict 1, 2, 6, 14 and acquit the rest.

By the Court:—As regards the sentences it is scarcely necessary to point out the crime of which the accused Nos. 1, 2, 3, 4, 5, 6, 7, 8 and 14 stand convicted is of a most serious character. The offence is the conspiracy itself. But although it is not necessary that anything should have been done to further the objects of the conspiracy the question whether any overt act has been committed in pursuance of the conspiracy is material in connection with the question of punishment. There is no evidence that any acts were done to carry out the purposes for which the conspiracy was formed.

Although in a sense the conspiracy was contemptible it was certainly not negligible and even though no acts of violence or lawlessness have been proved as the direct outcome of the conspiracy it is difficult to over estimate the mischievous effect of a conspiracy such as has been proved in this case on the minds of all brought within its influence.

Nilakanta *alias* Brahmachari (the 1st accused) was the organiser of the conspiracy and the leading spirit amongst the conspirators. It may well be that but for him the men who allowed themselves to be misled by him would not now find themselves in the dock. We sentence him to seven years' rigorous imprisonment.

Sankarakrishna Iyer (the 2nd accused) actively co-operated with Nilakanta and acted as his henchman. We sentence him to four years' rigorous imprisonment.

Harihara Iyer (the 7th accused) is a man of some position and education. We sentence him to three years' rigorous imprisonment.

We sentence Chidambaram Pillai (the 3rd accused) to two years' rigorous imprisonment. The remaining whom we convict are men of no importance and we think we are justified in dealing leniently with them. We sentence Muthukumarasami Pillai (the 4th accused), Subbiah Pillai (the 5th accused), Jagannatha Iyengar (the 6th accused), Bapu Pillai *alias* Ramasami Pillay (the 8th accused) and Pichumani Iyer *alias* Venkatachela Aiyar (the 14th accused) to one year's rigorous imprisonment each.

[On a Certificate under Cl. 26 of the Letters Patent by the Advocate-General on behalf of accused Nos. 4, 5, 6, 7, 8.*

The case was heard * by a Full Bench consisting of

Mr. Justice Benson, Mr. Justice Wallis, Mr. Justice Miller, Mr. Justice Abdur Rahim and Mr. Justice Sundara Aiyar. Ed.]

* Cr. M. P. Nos. 68 to 72, 76, 79 and 80 of 1912. 17th February 1912.

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Arguments.

C. F Napier. The decision of the Special tribunal is final and Cl. 26 of the Letters Patent does not apply to cases tried under the Criminal Law Amendment Act. Cls. 25 and 26 have reference only to cases coming within Cls. 22 and 24. This does not come within Cl. 24 because here the charges were not preferred by a Magistrate specially empowered or by an officer specially empowered. The commitment by the Magistrate in this case is by virtue of the statute and not on the authority or the power conferred by the Government. [*Abdur Rahim* J. Do the words "specially empowered &c", go with Magistrate also?] Yes. There is no "by" after "or." If those words were not intended to go with "Magistrate" also, there should have been a "by" after "or." There is no case in which a Magistrate commits direct to the High Court in the ordinary course of his duty [*Sundara Aiyar* J. What is there to show that Cl. 25 is limited to Clauses 22 and 24.] The scheme of the Letters Patent makes it clear. The Criminal Law Amendment Act is a special act passed with a view to procuring speedy trials and ought to be read as an interference with the Letters Patent which Cl. 24 of the Letters Patent permits.

L. A. Govindaraghava Aiyar Cl. 25 is not limited to cases coming within Cls. 22 and 24; (ii) the words "specially empowered" did not qualify, "Magistrate"; (iii) even supposing they did qualify, the Magistrate was specially empowered as the Government has to indicate in each case, that the procedure of the Act should be applicable to the case already taken cognizance of by the Magistrate, (iv) the words "charge preferred" have no meaning with reference to the Magistrate committing; (v) anyhow in this case the charges were preferred by Mr. Thomas, who was specially empowered by the Government in that behalf.

[Their Lordships overruled the preliminary objection. Ed.]

L. A. Govindaraghava Aiyar for petitioner in Cr. M. P. 71 of 1912. Ss. 133, 114 *ill* (*b*) of the Evidence Act together reproduce the English Law. Although there is nothing illegal in the conviction of a person on the uncorroborated testimony of an accomplice the rule has been formulated from the accumulated experience of successive Judges that an accomplice ought to be corroborated in material particulars. There may be special circumstances which might justify the Court in not drawing the inference attaching to his position as accomplice—then the presumption need not be raised. Hence the word "may presume." If once you are not

prepared not to raise the inference there ought to be corroboration in material particulars. The special circumstances are special circumstances that rebut the presumption of taint and not circumstances that reinforce the general credibility of the man. The majority have not kept this point clear before their mind. They have misdirected themselves as to the law applicable to accomplices. Just as it is a ground to set aside the verdict of the Jury, it is a ground here to set aside the finding of the Judges. There is this difference between the Jury and the Judge. The Jury's reasons are not open to examination—the Judge's are. Hence if after proper direction by the Judge, the Jury go wrong there is no means of correcting it. The Judge's reasons are given and we can scan them with a view of seeing if they have kept the law in view. This rule has been recognised from the time of *Elahi Bux's* [1] case. It is called a "settled rule of practice" in *Regina* v. *Sadhu Mandal.*[2] "A rule of universal application" as was said in *R.* v. *Deodhar Singh.*[3] It has become "a part of the law itself" *Jamiruddi Masalli* v. *Emperor.*[4]

The Judge ought to instruct the Jury that " it is not the practice of our courts to convict unless such evidence is corroborated in material particulars with respect to each individual *Jamiruddi Masalli* v. *Emperor.*[4] It is assumed to be a settled rule in *Deo Nandan Pershad* v. *Emperor,*[5] and *Emperor* v. *Lalit Mohan Chuckerbutty.*[6] It is said in the last case that it is "not a technical rule but a rule founded on long judicial experience." Similarly in Madras High Court Rulings[7] and *R* v. *Ramasami Padayachi.*[8] *Queen Empress* v. *Kunjan Menon* and *Sankunni*[9] where it is said that "it has now become a settled rule of practice that the Judge ought to advise the Jury to acquit if it is not corroborated. *R* v. *Arumugam*[10] does not propound the law differently. *R* v. *Mohiuddin Sahib*[11] assumes that the accomplice's evidence ought to be corroborated in material particulars. So also *R* v. *Smither*[12] *R* v. *Ramasami Goundan.*[13]

All the Judges including *Bhashyam Ayangar* J. take it that it is the rule. Sir Bhashyam Ayangar says at p. 288 that in the absence of "special circumstances" corroroboration is required.

1. (1866) 5 W. R. Cr. R. 80.
2. (1874) 2 I. W. R. Cr. R. 70.
3. (1899) I. L. R. 27 C. 144 at 152.
4. (1902) I. L. R. 29 C. 782.
5. (1906) I.L.R. C 33 C. 649
6. (1911) I.L.R. 38 C. 559.
7. (1868) 4 M.H.C. 7 (app.)
8. (1878) I.L.R. 1 M. 394
9. (1888) 1 M.L.J. 397
10. (1888) I.L.R. 12 M. 196
11. (1901) I.L.R. 25 M. 143
12. (1902) I.L.R. 26 M. 1.
13. (1903) I.L.R. 27 M. 271 at 272, 279, 283,

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In *Vyasa Rao's* case[1] Mr. Justice *Sankaran Nair* says that if the Judge refuses to raise the inference of incredibility for special reasons, the High Court has power to see if the special reasons exist. If the inference is raised, then there must be corroboration in material particulars. If the corroboration does not exist, the conviction will be set aside. See also *Abdur Rahim* J. in the same case. In Taylor Vol. I, Sec. 967 this rule is called a settled rule of practice. *Rex* v. *Tate*.[2] The Court of Cr. appeal in England call the failure to add the caution a neglect of duty on the part of the Judge.

In Rex v. *Everett*[3] it is said that the Judge ought to direct the Jury to acquit if the evidence of the accomplice is not corroborated in material particulars. Cited also *In re Kuppan*.[4] In *R.* v. *Ramasáran*[5] *Straight* J. says that in this matter the English law is not different from the Indian and that it is the duty of the Judge to caution the Jury when there is a Jury and guard himself when he is trying the case himself. The view of *Edge* C. J. in *R* v. *Gobardhan*[6] is not shared by the other Judges. *R* v. *Ramasaran*[5] is cited with approval in *R* v. *Abdulkarim*.[7] In *R* v. *Magan Lall*[8] their Lordships say that this rule is like the rule of logic one which the court is bound to bear in mind. It is not enough to state the rule *pro forma* to evade it. The judgment must shew some reason for the exceptional treatment of the case. Similarly *R* v. *Malhar*[9] and *R* v. *Hanmaut*.[10] In *In re Meunier*[11] the words of *Cave* J. ought to be taken with the words added by Lord Alverstone in the case *Rex* v. *Tate*[2]. As for the English law see *Reg* v. *Boyes*[12] and *Reg* v. *Gallagher*.[13] As said in the latter case, the law has always been that it is not illegal to convict on accomplice's testimony ; the practice is the other way.

The next point is—are previous statements of the accused such corroboration as the law contemplates ? S. 114 *ill (b)* says that the accomplice is to be corroborated not on his " testimony at the trial." The evidence by way of corroboration ought to be untainted evidence. His statement does not improve by repetition.

1. (1911) 1, M. W. N. 327 ; s. c. 21 M. L. J. 283.
2. (1908) 2 K. B. 680.
3. (1909) 73 J. P. 269.
4. (1909) 5 M. L. T. 255.
5. (1885) I. L. R. 8 A. 306.
6. (1887) I. L. R. 9 A. 528.
7. (1904) 1 A. L. J. 110.
8. (1889) I. L. R. 14 B. 115 at 119.
9. (1910) I. L. R. 26 B. 193 at 196
10. (1904) 6 Bom. L. R. 443 at 449.
11. (1894) 2 Q. B. 415.
12. (1861) 9 Cox. Cr. 32.
13. (1883) 15 Cox. Cr. 291.

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R v. *Maleppa Bin Kapaan*[1]; *R* v. *Bepin Biswas*[2]; *Queen Empress* v. *Baldeo*[3] and *Emperor* v. *Baji Krishna*.[4]

The corroboration must be by independent witnesses *Reg* v. *Mohesh Biswas*.[5]

Confession of the co-accused will not do *R.* v. *Malappa Bin Kanapa* [6] *R.* v. *Budhu Nanku* [7] Nor that of another accomplice. *Vyasa Rao's case*.[8]

Mayne p. 993 Cl. 758, Ameer Ali and Woodroffe p. 894. Taylor on Evidence, 9th Ed., Vol. I [*Wallis*, J. referred to 7 State Trial 710] Roscoe p. 110. The law has been so uniformly interpreted. regard must be had to such a long course of judicial interpretation. [9]

[*Sundara Aiyar*, J. drew attention to *Elson's case*.[10]]

The third point is—Are confessional statements admissible? The majority are of opinion that they are except against the man making it. The difference in the language of Ss. 25 and 26 and also between Ss. 24 and 26 of the Evidence Act is significant. Confession is not admissible under any circumstances in a criminal case against an accused person. *Emperor* v. *Hari Singh* [11] Where the legislature thinks that the prohibitive provision in one portion should not operate to exclude a piece of evidence when admissible on some other ground, the Legislature expressly reserves its admissibility on that ground, see Ss. 8, 21 and 43. Any incriminating statement is a confession. *Queen* v. *Mashews* [12], *Empress* v. *Jadab Das*.[13] In *Queen* v. *Tribhuvan Maneekchand* [14] the statement was made when one was under arrest, and another was under suspicion and his house was about to be searched.

The fourth point :—The next question is whether S. 162, Cr. P. C. is not a bar to the admissibility of this evidence. The policy that underlies the section is to make the police record inadmissible against the accused. Such a policy necessarily requires that even statements, reproduced by refreshing the memory by reference to the recorded statement, ought not to be used. If the

1. (1874) 11 B. H. C. 196.
2. (1884) I. L. R. 10 C. 970 at 973.
3. (1885) I. L. R. 8 A. 509.
4. (1904) 6 Bom L. R. 481.
5. (1871) 19 W. R. 16 (Cr. R.)
6. (1874) 11. B. H. C. 196.
7. (1876) I. L. R. 1 B. 475.
8. (1911) 1 M. W. N. 332, s. c. 21 M. L. J. 283.
9. (1871) L.R. 3 P. C. 605 at 650.
10. (1911) 76 J. P. 39.
11. (1910) 12 Bom L. R. 899.
12. (1884) I. L. R. 10 C. 1022.
13. (1899) 4 C. W. N. 129.
14. (1884) I. L. R. 9. B. 131.

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record is used to refresh the memory while in the witness box, it is illegal. *Emperor* v. *Narayan Raghunath Patki.*

It must similarly be illegal even if the refreshing takes place outside the court. The reasons against the admissibility of statements made to Police Officers are stated by *Beaman* J. in *Emperor* v. *Narayan* [1] and by *Knox* J. in *Rustom* v. *Emperor.*[2] *Emperor* v. *Akbar Badoo.*[3]

The fifth question is :—Competency of the C. I. D. Inspector to investigate. His submission was that C. I. D. Inspector was not competent to investigate for several reasons; (i) because he was not appointed for the local area, (ii) he was not authorised to investigate the case generally, (iii) and all that he was asked to do was to search. Search could not be held to include all powers of investigation. Search was only one of the several powers included in investigation. The Police Act does not conferon them the power to investigate. It is the Criminal Procedure Code that does. The Criminal Procedure Code, S. 551 requires the Police Officer to be appointed to the local area. The Government order cannot be so read as to appoint all Police Officers in the Investigation Department to the whole Presidency. It is only a notice to the officers that they must keep themselves in readiness to proceed to any place within the Presidency. A police *corps* is thereby organised in readiness to assist the local Police in whichever part of the Presidency assistance is sought. They are only to assist. They are not expected to "supersede" the local Police. A Police Officer can assist another in innumerable ways without himself "investigating." Collection of information is after all the most essential part of the detecting officer's functions. That can be discharged without power to investigate.

Mr. *Devadoss* :—Illustrations to S. 114 are all rules of law which cannot be disregarded. The Legislature has picked out a few of the presumptions, and invested them with the force of rules of law. S. 114 covers all kinds of presumptions; some of them purely based upon experience which courts may raise or may not at all raise.

C. F. Napier for the Crown; The Indian Evidence Act is a Code. In interpreting a code, the previous state of the law is irrelevant. *Narendranath Sircar* v. *Kamali Basini Dasi.*[4] *Munshee*

1. (1907) I. L. R. 32 B. 111 F.B.
2. (1910) 7 A. L. J. 468.
3. (1910) I. L. R. 34 B. 599.
4. (1896) I. L. R. 23 C. 563 P. C.

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Buzloor Rahseem v. *Shumsoon nissa Begum* and *Jadunath Bose* v. *Shumsoon nissee Begum.*[1]

There is no presumption that the law is not altered. *Johnson* v. *Madras Railway Company.*[2]

Act II of 1855 saved the rule of practice as to accomplice's testimony. On the other hand, the Evidence Act repeals them all. The language of S. 114 must be given its natural meaning. The court or the Jury may presume unworthiness. The illustrations must not be given the effect of restricting the section. The circumstances set forth in the illustrations are not the only circumstances under which the accomplice may be believed. [*Abdur Rahim* J. drew attention to ill. e. f. and j.] He submitted that they too are presumptions of fact. Of course if the court totally disregarded it or perversely said it would not regard them that is another matter. It must be borne in mind that *R.* v. *Elahi Bux*[3] is based on the Act of 1855. A rule of practice however prevalent if against law ought to be discontinued. *Balkaran Rai* v. *Gobind Nath Tivani*[4] *R.* v. *Ramasami Padayachi*[5] properly says that the explanation of the illustration is a sequel in the nature of a warning not to raise the presumption. The presumption has been carefully appraised in *R.* v. *Gobardhan*[6] and *R.* v. *Magan Lall*[7] see also *Kamala Prasad* v. *Sital Prasad*[8] and *R.* v. *Malhar.*[9]

It is not a mistake of law when the Jury convicts though the Judge says it is not safe to convict. *R.* v. *Ramasamy Goundan*[10] says that it is a rule of practice however hallowed by age that rule might be. In *Reg* v. *Boyes*[11] the court observed that it was a question of fact. *Reg* v. *Gallagher*[12] says that there must be a certain amount of confirmation to satisfy the Jury. To withdraw the case from the Jury because there is no corroboration is an error in law *In re Meunier.*[13]

The judgments of the court of Criminal appeal now are not of much value as they can interfere even on questions of fact if there has been a miscarriage of justice, see Ss. 4 and 28 of the Statute *second question: As to corroboration.* There is nothing in the Evidence Act to make accomplice's previous statements an exception to S. 157 of the Evidence Act. [*Sundara Aiyar* J. see the language of the illustration: " accomplice " may be presumed

1. (1867) 11 M. I. A. 551.
2. (1905) I. L. R. 28 M. 479.
3. (1866) 5 W. R. Cr. R. 80.
4. (1890) I. L. R. 12 A. 129 at 135.
5. (1878) I. L. R. 1 M. 394.
6. (1887) I. L. R. 9 A. 528 at 553.
7. (1889) 14 B. 115 at 118.
8. (1901) I. L. R. 28 C. 339.
9. (1901) I. L. R. 26 B. 193 at 198.
10. (1903) I. L. R. 27 M. 287.
11. (1861) 9 Cox. 32.
12. (1883) 15 Cox. 291.
13. (1894) 2 Q. B. 415.

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unworthy of credit unless " he is corroborated.] All that is meant is *his testimony*. See Ss. 155 and 156 of the Evidence Act and the explanation itself they point to a different conclusion. *Elson's case*[1] seems to show that in England it is corroboration. [*Sundara Aiyar* J. see *R* v. *Dymes.*][2] See Howell's State Trials, p. 1110 and also *R.* v. *Budhu Nuku*[3] *R.* v. *Bepin Biswas* [4] and *Reg* v. *Mohesh Biswas.*[5]

The third question :—As to Sec. 25 of the Evidence Act—The chapter shows that it has regard only to parties or their representatives or he would addquasi-representatives. There is no reason why difference ought to be made between Ss. 25 and 26. *Sundara Aiyar*, J. see S. 24.] The only way that this confession can be used against the co-accused is under S. 30. If it is not provable against the accused, it would not be provable against the co-accused.

[*Sundara Aiyar*, J., S. 24 does not prohibit proving.]

As to competence to investigate in the C. I. D. Officer :—The question is essentially a question of fact and that majority have found that he had authority to investigate. As required by S. 551, Criminal Procedure Code, he is a superior in rank to a Station-House Officer. He has local jurisdiction because every Inspector is appointed to the entire Police Department. Ss. 1, 59 and 24 of the Police Act. He has power to detect crimes &c., under the Police Act; therefore he is legally competent to investigate. The word " investigate," there is no reason to suppose is used in the same sense in the Evidence Act as in the Criminal Procedure Code. There is no question that the Deputy Inspector-General of Police could have appointed him to investigate any case. He was asked to assist in the investigation. He was sent on a search party. It is not an unreasonable view to take, he submitted that he was authorised to investigate generally. Search is investigation; therefore he must be taken to have been authorised to investigate. The Government order organising the department expressly says that this department is organised to assist in the investigation of crimes throughout the Presidency. It lays down the way in which the Criminal Investigation Department Officers are to act towards Local Police Officers. He submitted that S. 551 did not give authority to the Inspector to summon witnesses from all parts of the Presidency. They could be summoned only from the neighbourhood.

1. (1911) 76 J. p, 38.
2. 1911) 76 J. p. 47.
3. (1876) 1 B. 475.
4. (1884) I. L. R. 10 C. 971.
5. (1871) 19 W. R. 16.

T. M. Krishnaswami Aiyar replied. He submitted in addition even supposing that Veeraraghavier was competent otherwise, he was authorised to investigate only the offence of murder, and not the offence of conspiracy—which is a cognisable case. In the Police Act, the word " Police Officer" included Village Police and it was very unlikely that legislature gave them the large powers the Police Act was sought to be read as conferring.

Judgments :—*Benson, J*:—In this case fourteen persons were tried by a Special Bench of this Court, constituted under Section 6 (*b*) of the Indian Criminal Law Amendment Act, 1908, for an offence, punishable under Section 121 A, Indian Penal Code (conspiring to commit certain offences against the State), and also with abetting the murder of Mr. Ashe. The Special Bench acquitted all the accused on the latter charge. The majority of the Court (Sir Arnold White, C. J. and Ayling, J.) convicted the first seven and the 14th accused of the offence, charged under section 121 A and acquitted the remainder. The third Judge of the Special Bench (Sankaran Nair, J.) convicted the 1st, 2nd, 6th and 14th accused and acquitted the remainder. The late Advocate-General has given a certificate under Clause 26 of the Amended Letters Patent of 1865 to the effect that the decision of the Court on certain specified points of law requires further consideration. The present Advocate-General, who, as Public Prosecutor, appeared for the Crown at the trial, raises a preliminary objection that the Letters Patent do not authorise the grant of a certificate in a case tried by a Special Bench appointed under the Indian Criminal Law Amendment Act of 1908. His contention is that cases under the Act must be dealt with in accordance with the special procedure prescribed by the Act and that there is no provision in it for a review of judgment either on a certificate from the Advocate-General or otherwise. The Act, however, does not profess to lay down complete rules of procedure: the ordinary procedure has to be followed except in so far as it is modified by the Act; there is nothing in the Act to modify the ordinary procedure in this particular respect. Clause 26 of the Letters Patent gives power to the High Court on the Advocate-General's certificate to review in every case mentioned in Clause 25 of the Letters Patent *i. e.* in " any criminal trial before the courts of original criminal jurisdiction which may be constituted by one or more of the Judges of the said High Court." The present trial satisfies these conditions and is therefore open to review on a certificate granted by the Advocate-General.

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The points of law which are certified as requiring further consideration are stated as follows in the certificate of the Advocate-General:—

1. "That in my judgment the opinion of the majority of the court that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon, and that it would be open to the court to convict on the uncorroborated testimony of an accomplice if the court was satisfied that the evidence was true, requires to be further considered; and it requires to be further considered whether Section 133 of the Indian Evidence Act read with Section 114 illustration (*b*), does not merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances.

2. "That in my judgment the opinion of the majority of the court that the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial should be further considered.

3. "That in my judgment the opinion of the majority of the court that the statements made by P. W. 6. and P. W. 12 to P. W. 31 were made to an authority legally competent to investigate the facts within the meaning of Section 157 of the Indian Evidence Act, should be further considered.

4. "That in my judgment the opinion of the majority of the court that the statements of P. W. 6 and P. W. 12 to P. W. 31 were not rendered inadmissible by reason of the provisions of Section 25 of the Indian Evidence Act, should be further considered.

5. "That in my judgment the opinion of the learned Judges that, while the statements made by a person to a Police Officer in the course of an investigation and taken down in writing may not be proved by the production of the writing, they may be proved by oral evidence requires to be further considered."

The facts of the case, so far as is nesessary to understand the questions raised, may be briefly stated as follows:—

The accused are alleged by the prosecution to have conspired at various places between January 1910 and 17th June 1911 with certain persons not now before the Court, *viz.*, with one Vanchi Aiyar, who is proved to have shot himself on the 17th June 1911 immediately after murdering Mr. Ashe, (who was then District

Magistrate of Tinnevelly), one Dharmaraja Aiyar, who is now dead, (the case for the Crown being that he committed suicide) and one Madaswami who has absconded, and also with three others Arumugam, Somasundaram and Ramasami Aiyar, who were given a pardon under the usual conditions and taken as approvers and called as witnesses (Nos. 6, 12 and 16) for the prosecution in this case. The approvers have given evidence as to a certain treasonable society founded by the 1st accused, Nilakantan, of which they were all members. They have also given evidence of meetings of the society at Tenkasi and Tuticorin and elsewhere attended by the accused, and there is no question but that, if the accused were present at these meetings and took the "blood oath" as alleged by the approvers, they are guilty. The chief evidence against the accused is the evidence of the several approvers. They are admittedly accomplices. The questions of law that have been raised relate to the legal validity of an accomplice's evidence, if uncorroborated, and to the admissibility and legal effect of certain statements made by two of the accomplices (Arumugam and Somasundaram) in this case prior to the trial. The following are the circumstances under which the statements were made. Mr. Ashe was murdered for political reasons by Vanchi Aiyar on the the 17th June, and Vanchi immediately afterwards shot himself. When his house at Shencottah was searched next day (18th), certain letters were found which showed that Arumugam (P. W. 6) was in communication with him; so on the evening of the next day (19th) immediately after the arrival of Mr. Thomas, the Duputy Inspector-General of the Criminal Investigation Department, a party of police was despatched to Tuticorin to search his house. The party was in charge of Mr. Johnson, Assistant Superintendent of Police, a Gazetted Officer of 3 years' standing and of Veeraraghava Aiyar (P. W. 31), an Inspector of the C. I. D. who had just arrived with Mr. Thomas from Madura. Having arrived at Tuticorin the party surrounded the house of Arumugam about 2 hours after midnight and sealed it with a view to search it after daybreak. Arumugam was awakened and told that his house would be searched in connection with the murder and he was asked if he knew anything about it. He then offered to tell all he knew, and his statement was thereupon taken and recorded in the Inspector's note book. On information given by Arumugam, the house of Somasundaram (P. W. 12) was searched the next day, and he in like manner made a statement to Veeraraghava Aiyar, which was recorded by him. Three days later, both these men made statements substantially to the same effect to Mr. Cox, the Magistrate, which he recorded

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under Section 164, Criminal Procedure Code. At the trial before the Special Bench, which began in the following September and went on for some months, Arumugam and Somasundaram were examined as witnesses for the prosecution and gave evidence, as already stated, involving not only their own guilt, but also the guilt of several of the accused who took the "blood oath" at the treasonable meetings held at Tenkasi and Tuticorin. In order to corroborate this evidence of the accomplices, given at the trial, the prosecution relied on the statements recorded by the Magistrate Mr. Cox. They also called the Inspector, Veeraraghava Aiyar, to give evidence of the statements made to him by the accomplices. The defence object to this evidence as inadmissible, but the majority of the Special Bench held that the Inspector might give oral evidence of the statements made to him, but could not use the writing in his note book as evidence. The learned Judges of the Special Bench state in their judgments that the extent to which and the conditions under which, the evidence of accomplices should be acted upon was the subject of much argument and contention before them, and their judgments show that they considered the various questions raised with the greatest care and came to their conclusions after a full examination not only of the codified law of the courts in England and India relating to the questions raised.

I will now turn to the five points of law which the Advocate-General certifies should be further considered.

The *first* is thus stated:—

"The opinion of the majority of the court that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon, and that it would be open to the court to convict on the uncorroborated testimony of an accomplice if the court was satisfied that the evidence was true, requires to be further considered; and it requires to be further considered whether Section 133 of the Indian Evidence Act read with section 114, illustration (*b*) does not merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances." The substantive provision of the Indian code law is contained in Section 133 of the Indian Evidence Act, 1872, which, in explicit terms, declares that "An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." But with this section it is also

necessary to bear in mind Section 114 which provides that "The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." To assist the courts in applying the general words of this section, various illustrations are appended to it. One of these relates to accomplices, and it is stated as follows:—"The court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. But the court shall also have regard to such facts as the following, in considering whether such maxim does or does not apply to the particular case before them:—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement describes precisely what was done, and admits and explains the common carelessness of A and himself." And again, "a crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such manner as to render previous concert highly improbable." In my opinion there is nothing in the illustration (*b*) to Section 114 which over-rides, or renders nugatory, the plain and explicit declaration contained in Section 133, or which requires us to hold that the evidence of an accomplice must always, and in all circumstances, be regarded as unworthy of credit unless it is corroborated in material particulars, or which requires us to hold that it is not open to the court to act on such evidence, even when the court believes it to be perfectly true. The very terms of the illustration itself appear to be intended to guard against such an interpretation. The words are "the court *may* presume" (not "the court *shall* presume") "that an accomplice is unworthy of credit, unless he is corroborated in material particulars." But it then adds a caution to show that the presumed unworthiness is not a rule of universal application. It styles the presumption "a maxim," not a rule of law, and says, "but the court shall also have regard to "certain facts" in considering whether such maxim does or does not apply to the particular case before it." It then refers to the case of a person of the highest character giving evidence of an offence committed by the negligence of himself and another person of equally high character. The witness is an accomplice, and he is not corroborated in any particular, still less in material particulars; yet the court should have regard to various

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circumstances, *viz.*, the high character of the witness, and of the accused, and the nature of the offence alleged, and would be at liberty to refuse to draw any presumption against the credibility of the witness, even though his evidence stood alone and uncorroborated.

Judges do, no doubt, ordinarily regard the evidence of accomplices with great suspicion, and rightly so, for reasons which are so manifest and so often stated that it is unnecessary to restate them here, and judges do ordinarily require corroboration in material particulars before they will act on the evidence of an accomplice. It is the duty of the judge to explain to the jury the taint and infirmity which ordinarily attach to the evidence of an accomplice, and to remind them that they may presume that his evidence is unworthy of credit unless corroborated in material particulars. But it is also his duty to refer to any circumstances or facts (such as those referred to in the illustrations to Section 114) which show that the presumption should not be drawn in the particular case or which rebut the presumption, if drawn, and he should instruct them that if, having scrutinized the evidence of the accomplice with care and caution, and having considered it in the light of the circumstances in which it was given, and all other circumstances, tending to show its truth or falsehood, they believe it to be true they should act upon it, even though there may be no corroboration of it in the strict sense of the word, but that if they are not satisfied of its truth they should refuse to act upon it.

This is, in effect, how the majority of the Special Bench have laid down the law. In my opinion they have correctly stated the law as laid down in the Indian Evidence Act, and in the Indian and English cases quoted by them: *Reg.* v. *Ramasami Padayachi*[1] *Ramasami Gounden* v. *Emperor,*[2] *per* Bhashyam Iyengar, J., *Queen-Empress* v. *Goberdhan,*[3] *per* Edge, C. J, *Reg.* v. *Boyes,*[4] *per* Cockburn, C. J. *Reg.* v. *Gallagher,*[5] *per* Coleridge, C. J. and *Rex* v. *Tate,*[6] *per* Lord Alverstone, C. J.

The suggestion made in the latter part of the Advocate-General's first point, if I understand it aright, is that the presumption of untrustworthiness must always, and in all circumstances, first be drawn, and the evidence cannot in any case be acted upon unless "*special circumstances*" are found which rebut the presumption. I think this way of stating the law is less accurate than

1. (1878) I. L. R. 1 M. 394.
2. (1903) I.L.R. 27 M. 271 at p. 290.
3. (1887) I.L.R. 9 All. 528 at p. 554.
4. (1861) 9 Cox C. C. 32.
5. (1883) 15 Cox C. C. 291
6. (1908) 2 K. B. 680.

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that adopted by the majority of the Special Bench and might possibly mislead juries by leading them to think that circumstances affecting their judgment should be technically divided into two classes, special and non-special or ordinary, and that unless a circumstance could be technically labelled "special" it should not be at all considered by them. Section 114 speaks simply of "facts" not "special circumstances," and the caution attached to illustration (*b*) merely says "the court shall also have regard to such *facts* as the following" not "*special*" facts or "*special*" circumstances. Any fact which is admissible as evidence, and which is duly proved, may, in my opinion, be considered for what it is worth without attempting to classify it as a "special" or non-special fact. In this connection, however, it may be stated that the majority of the Special Bench do, in fact, refer to a number of what may well be called special circumstances, which powerfully influenced their opinion as to the credibility of the accomplice witnesses. It is therefore, difficult to understand what practical purpose was to be served in the present case by the further consideration of the first question raised by the certificate of the Advocate-General.

In dealing with the first point in the Advocate-General's certificate, Mr. Govindaraghava Aiyar, on behalf of the accused, desired to argue that the view of the majority of the Special Bench as to what constitutes "material particulars" in illustration (*b*) to Section 114 is incorrect. We, however, were unanimous in holding that no such question was raised in the certificate of the Advocate-General and that it was not open to the accused's pleader to argue any question of law not raised in the certificate. Mr. Govindaraghava Aiyar contended that as soon as a certificate was granted in regard to any point of law the whole case was opened up for consideration under Clause 26 of the Letters Patent. That clause is as follows:—"on its being certified by the said Advocate-General that, in his judgment, there is an error in the decision of a point or points of law decided by the court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said court should be further considered, the said High Court shall have full power and authority to review the case, or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the court of original jurisdiction, and to pass such judgment and sentence as to the said High Court shall seem right." I do not think that these words can be held to open up the whole case as if on appeal, for Clause 25 enacts that there shall be no appeal. The grant of the certificate no doubt gives the court "power and authority to review

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the case or so much of it as may be necessary," that is, in my opinion, " necessary " in order to determine the point or points of law raised. This is clear from the words " and finally determine *such* point or points of law " which follow the word "necessary"; after the point or points of law have been finally determined, then, or to use the word in Clause 26 " thereupon", the court may alter the sentence and pass such judgment and sentence as may seem right; and the court may, of course, then go into the case so far as is necessary in order to enable it to do this correctly. When the case has reached that stage, then the court has to be guided by Section 167 of the Indian Evidence Act which enacts that " the improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision." This view is in accordance with the judgments of Beaman and Devar, JJ. in the case reported in *Emperor v. Narayana Raghunath Patki*,[1] where the question is fully discussed.

Turning now to the *second point* in the Advocate-General's certificate, it is stated as follows:—" In my judgment the opinion of the majority of the court that the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial, should be further considered." There were two sets of previous statements of Arumugam and Somasundaram admitted at the trial, *viz.*, (1) their statements to Inspector Veeraraghava Aiyar and (2) their statement, 4 and 3 days respectively later, to the same effect to the Magistrate, Mr. Cox, recorded by him, under Section 164, Criminal Procedure Code. I think that the opinion of the majority of the Full Bench on the question of their admissibility is right. The law on the subject is contained in Section 157 of the Indian Evidence Act, 1872, which reproduces in a simplified form the provision in Section 31 of Act II of 1855 and enacts that " In order to *corroborate* the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved." This section, which differs widely from the English law, expressly states that a former statement made by a witness may, if made under the conditions stated in the section, be proved in order to *corroborate* the evidence of the witness at the trial. No

1. (1907) I. L. R. 32 B. 111.

exception is made in the section, or elsewhere in the Act, so as to exclude such former statements in the case of a witness who is an accomplice. It was contended in the argument that the general rule as to the admissibility of former statements laid down in Section 157 is limited in the case of accomplices, by a special rule to be inferred from illustration (*b*) to Section 114. It may, however, be doubted whether such a method of reasoning is not contrary to accepted canons of interpretation. It seemed unreasonable to hold that the express rule of law stated in Section 157 can be limited by a maxim which is not of universal application. The validity of the suggested reasoning depends on an assumption that the court must always, and in all circumstances, presume that an accomplice is unworthy of credit, whereas we have seen in dealing with the first point certified by the Advocate-General that there may be circumstances in which the court would be justified in not drawing the presumption. The illustration itself gives an instance of such a case. In such a case it is impossible to see any reason why the evidence of the accomplice witness should not be corroborated by a previous statement to the same extent and subject to the same conditions as in the case of a witness who was not an accomplice. I do not think that there is anything in the Indian Evidence Act to exclude the evidence of accomplices from the plain and express rule in Section 157, nor can it be suggested that "corroborate" is used in Section 157 in a different sense from that in which it is used in illustration *(b)* to Section 114. The former statement of an accomplice is, therefore, legally admissible, to corroborate his testimony at the trial and the weight to be attached to it, or, in other words, how far it does really corroborate the evidence given at the trial must vary with the facts of each case. No hard and fast rule, capable of mechanical application, can be laid down. In the great majority of cases, it would, no doubt, be found to be merely the repetition of tainted evidence affording no ground for believing it to be true, and, therefore, adding nothing whatever to its value. On the other hand, if there was evidence, or even a suggestion, put forward by the defence that the evidence given by the witness at the trial was the result of recent influences brought to bear upon him, it would be most important to be able to prove that the witness had made statements to the same effect as his evidence at the trial long before the influences relied on by the defence had been brought to bear upon him. For example, take the accomplice, Arumugam, in the present case. He gave evidence at the trial involving several other persons beside, himself, and stating various particulars about the treasonable meetings which they attended. If

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the prosecution proposed to corroborate that evidence by proof of a former statement made months after his arrest, and when the police had collected their other evidence, and had, in fact, completed the scheme of the case to be proved against the accused, it is obvious that the former statement would add no strength to, would be no real corroboration at all, of the evidence of the witness at the trial. But, is not the case very different when, as was found by the majority of the Special Bench, it appears that Arumugam first told the same story at a time, and under such circumstances, as to entirely negative the idea that it was either falsely concocted by himself or suggested to him by the police; when it appears that the story told was not what the police wanted at that time, nor was such as was supported by the evidence then in their hands, nor was such as would have been concocted by Arumugam either of his own motion, or in consultation with Madasami or Somasundaram, if he was anxious to protect himself or them from prosecution for complicity with Vanchi Aiyar in the murder of Mr. Ashe, nor was such as Arumugam's previous relations with the persons then named would render probable? It is not unreasonable to say that those and similar matters referred to by the majority of the Special Bench ought not to have been considered in judging whether Arumugam was a truthful witness or not? So, too, if there was reason to think that owing to the lapse of time the memory of a witness at the time of the trial could not be wholly relied on, the fact that he had made a statement to the same effect when the facts were fresh in his memory would be highly relevant in corroboration of the evidence at the trial. The rule, then, would seem to be that the former statements are legally admissible, and may be considered for what they are worth, but that the weight to be attached to them depends entirely on the facts of each case. The point raised in the Advocate-General's certificate is whether such statements "can legally amount to corroboration of the evidence given at the trial." It is not clear whether this means "are legally admissible as corroboration" or whether it means "can legally amount to corroboration *in material particulars* within the meaning of illustration (*b*) to Section 114." If it means the former, I have stated the answer above. If it means the latter, I do not think that the question is one that arises in this case.

In the argument before us it was assumed by the pleaders for the defence, that Arumugam and Somasundram were found by the majority of the Court to be unworthy of credit by reason of their

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being accomplices, and that it was, therefore, necessary to find that they were corroborated in material particulars within the meaning of Section 114, illustration (*b*), before their evidence could be relied on, and that the former statements made by them were used as such corroboration. I do not think that this is a correct view of the judgment of the majority of the Special Bench. I do not anywhere find that they arrived at the conclusion that the approvers were untruthful witnesses. On the contrary they distinctly arrived at the conclusion that they were truthful witnesses. In arriving at this conclusion they state that they were influenced by the way in which they stood the test of cross-examination. They say that each of these witnesses "was subjected to the most rigorous and searching cross-examination at the hands of one after another of the ten learned counsel and vakils appearing for the defence for periods extending over two or three days" and that though the cross-examiners had the advantage of being able to compare their evidence at the trial with three prior statements (viz., those made before Veeraraghava Aiyar, and before Mr. Cox, and before the Committing Magistrate) "the prolonged cross-examination did not succeed in breaking down the evidence of any of the three approvers," and they conclude by saying, "we do not consider that there is anything in the evidence of the witnesses inconsistent with its substantial truth." They had previously referred to the circumstances under which the approvers made their first statements, especially the intrinsic evidence of truthfulness to be derived from the very nature of the facts stated. They pointed out that the circumstances under which the statements were first made strongly negatived the idea that they were the result either of concoction by the witnesses themselves or of suggestion by the police; that the story told was not what the police wanted, and that the persons implicated were not those that would probably have been implicated if the police had suggested the statements or wished to obtain evidence to fit in with the letters then in their hands. They also pointed out that the story told was not such as would have been concocted by Arumugam either by himself or in consultation with Madasami or Somasundaram in order to save themselves from prosecution for complicity with Vanchi Aiyar in the murder of Mr. Ashe. They also considered that the conduct of Arumugam in not destroying the highly seditious literature found in his house, and his previous relations with the persons accused as conspirators, negatived the idea of the story having been concocted by the witnesses. In view of all the circumstances in which the statements were made and the inferences to be drawn from the nature of the statements and the

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conduct of the witnesses themselves, the majority of the Special Bench found it "impossible" to believe that the statements were "tutored" by the police or "concocted" by the witnesses themselves. If the evidence was not "tutored" by the police or "concocted" by the witnesses themselves, there would be no reason for regarding it as other than truthful in the ordinary sense, that is truthful so far as the witnesses themselves knew and believed, though, of course, the witnesses might make an unintentional mistake like any other honest witnesses. This view is not inconsistent with the fact that the majority of the Special Bench acquitted the 9th and 13th, accused, though they were apparently implicated by the approvers, Ramasami and Arumugam respectively. It will be seen that they were acquitted, not because the approvers were found to be intentionally giving false evidence against them, but because there was a doubt in each case as to whether the accused was the person really referred to by the approver as present at the meetings.

It is clear, then, that the majority of the Special Bench, for reasons stated, came to the conclusion, that the accomplice witnesses were truthful witnesses and were not unworthy of credit so as to require corroboration in material particulars, if that phrase is to be interpreted (as some of the cases do interpret it) as requiring that the corroboration should be by the evidence of independent witnesses. We have already seen, in dealing with the first point raised by the Advocate-General, that corroboration is not legally necessary if there are circumstances which lead the court to the conclusion that the witness though an accomplice is a truthful witness.

The question, then, "whether the previous statement of an accomplice can legally amount to corroboration in material particulars of the evidence given at the trial within the meaning of illustration (*b*) to Section 114" is one that is not expressly raised by the certificate of the Advocate-General, nor do I think that it is one which it is necessary to consider in order to decide the questions raised by him, or the correctness of the judgment of the majority of the Special Bench. I have already shown how the former statements have been used in their judgment to corroborate the evidence of the witnesses given at the trial, and I have expressed the opinion that they were admissible under Section 157 and were properly used.

If, however, it is necessary in this case to determine whether the phrase "material particulars" in illustration (*b*) to Section 114

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is to be regarded, as in some sense, a technical expression implying corroboration by independent or untainted evidence, I am unable to go so far and to say that as a matter of law the previous statement of an accomplice can never amount to corroboration in material particulars. The pleader for the defence relies on the cases reported in *Reg.* v. *Malapabin Kapana,*[1] and *Queen Empress* v. *Bepin Biswas.*[2] In the former, it was said, at page 197, that the previous statement of an accomplice "can scarcely be said to answer the purpose for which juries are advised by judges to require the evidence of an accomplice to be confirmed." In the latter, the Judges refer with approval to the Bombay case, but add at page 974. "It is not necessary for us to consider whether the rule *should be extended as far as to exclude a statement made before arrest,* but we have no doubt at all that the exact correspondence in details of several statements made by an approver in the course of a trial is not corroborative evidence, such as we ordinarily require to make it safe to convict any particular prisoner." It is clear that the Judges in that case did not lay down any such absolute rule as is now suggested by the pleaders for the defence. If there are some circumstances in which a prior statement may amount to sufficient corroboration, we cannot say as a matter of law that a prior statement can never be corroboration in material particulars, though, no doubt, in the great majority of cases, it will be found that the prior statements do not add anything to the credibility of the evidence given at the trial. As I have already said, how far a prior statement does corroborate evidence given at the trial is a matter to be determined by the jury (or, where there is no jury, by the judge), on a consideration of all the facts of the case including the time when, and the circumstances in which, the former statement was made, and the facts related in the statement, considered in their relation to the knowledge of the speaker at that time and all the surrounding circumstances.

It may be added that very little light as to the application of Section 157, can be gained from a consideration of English cases, since the English law has no rule similar to that in Section 157 and is generally unfavourable to the admission of former statements of a witness to corroborate his evidence at the trial, though permitting it in certain cases.

The 3rd, 4th and 5th points certified by the Advocate-General relate to three objections that were taken to the admissibility of

1. (1874) 11 Bom. H. C. R. 196. 2. (1884) I. L. R. 10 Cal. 970.

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the statements made by the accomplices, Arumugam and Somasundaram, to Veeraraghava Aiyar. It may be stated at once that the admissibility or inadmissibility of those statements cannot make any difference in the decision of the present case, since the majority of the Special Bench who admitted the statements expressly say that they find it impossible to believe that the statements were either tutored or concocted, even if the witnesses' statements to Veeraraghava Aiyar are discarded and if regard is paid only to their statements recorded, four and three days respectively later, to the same effect, by Mr. Cox, the Magistrate, under Section 164, Criminal Procedure Code, the admissibility of which is not, and cannot be disputed. As, however, the questions are raised in the Advocate-General's certificate and are of great general importance, I will state my opinion in regard to each of them.

The objection referred to in the *fifth point* depends on the construction of Section 162 of the Criminal Procedure Code and may be very shortly dealt with. All the Judges of the Special Bench are agreed as to the proper construction of that section. The same construction was placed upon it in the recent case of *Fanindra Nath Banerjee* v. *Emperor* [1] The words of the section are clear. I agree with the conclusion arrived at by all the Judges of the Special Bench, and for the reasons stated in their judgments.

The *third point* may also be shortly disposed of. The question is whether Veeraraghava Aiyar was an authority "legally competent" within the meaning of Section 157 of the Indian Evidence Act, to investigate the facts in relation to which the former statements of Arumugam and Somasundaram were made, that is, the facts relating to the murder of Mr. Ashe. It was contended before us that the words "competent to investigate" must refer exclusively to the persons competent to hold the police investigation into an alleged offence, under Chapter 14 of the Criminal Procedure Code. But I do not think that this view is correct. The words in the Evidence Act are perfectly general, "competent to investigate the fact"—Can it be supposed, for instance that a statement made before a Civil Court relating to some fact, the existence of which the court was legally competent to try, and otherwise relevant under Section 157 of the Indian Evidence Act in a subsequent criminal trial, could be shut out on the ground that the word "investigate" would not include a trial by a Civil Court? I take it that the answer must be in the negative. It is unfortunate that there was no adequate inquiry before the Special

1. (1908) I. L. R. 36 Cal. 281.

Bench as to how far Inspector Veeraraghava Aiyar was an authority legally competent to investigate the facts relating to the murder of Mr. Ashe. The Deputy Inspector-General of his Department, Mr. Thomas, was a witness, but he was never asked any question at all as to the Inspector's competency to investigate. The result is that we are obliged to deal with the case on very imperfect information as to the facts. On the whole, however, I am inclined to hold that the Inspector was legally competent to investigate the facts relating to Mr. Ashe's murder. He was an Inspector of the Provincial Criminal Investigation Department, a branch of the Police, whose work is not confined to any particular district, but which was created "*to assist in the investigation of crimes* which are of such a special character that the local officers are unable to deal with them adequately without help." (G. O. No. 913, Judicial dated 2nd July 1908). He was directed by the head of his own department (the Deputy Inspector-General) and by the Local District Superintendent of Police to search certain houses, including the house of Arumugam at Tuticorin, in connection with Mr. Ashe's murder. It is not contended that his deputation for this duty was other than legal or that he was not legally competent to conduct or take part in the searches. I take it that conducting the searches was an integral part of the investigation, and legal competency to conduct the searches carried with it legal competency to do all things properly incidental to, and connected with, the searches, and included the listening to any statements relating to the murder or those who took part in it, made by persons whose houses were being searched. I do not think that the words "investigate the fact" in Section 157 of the Indian Evidence Act should be construed in a narrow sense so as to restrict competency to the Police Officer who, under Chapter 14 of the Criminal Procedure Code, is charged with the investigation of an offence. I am, therefore not prepared on the evidence before me to dissent from the view of the majority of the Special Bench that the Inspector was an officer legally competent to investigate the facts relating to Mr. Ashe's murder within the meaning of Section 157 of the Indian Evidence Act. A suggestion was thrown out that "the facts" in this case must be the conspiracy, not the facts generally relating to the murder of Mr. Ashe, and it was argued that, in that view, the Inspector could not investigate it without the order of a Magistrate, as it (the conspiracy) is a non-cognizable offence. This argument, I think, proceeds on an incorrect view. The Inspector was engaged in and upon the investigation of facts relating to Mr. Ashe's murder, and the statement was made to him by the person whose house was being

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searched and it was made as a matter "relating" to the murder. It cannot be regarded as relating only to the conspiracy and not at all to the murder.

It remains to notice the *fourth point* in the Advocate-General's certificate which is as follows:—"That in my judgment the opinion of the majority of the court, that the statements of P. W. 6 and P. W. 12 to P. W. 31 were not rendered inadmissible by reason of the provisions of Section 25 of the Indian Evidence Act, should be further considered." Section 25 of the Indian Evidence Act states that "No confession made to a police officer shall be proved as against a person accused of any offence." The words of Section 25 in their plain and ordinary meaning seem to me to render the statements made by the accomplices to the Police Inspector, Veeraraghava Aiyar, inadmissible. The statements are confessions: they were made to a police officer and it is now sought to use them as against some of the accused in this case. The majority of the Special Bench point out that in Section 26, the confession (when made not to a police officer, but while in his custody) is expressly made inadmissible only as against the person who made it, but may be proved as against other persons and observes that as the "mischief" of the two sections is the same, Section 25 also should be understood as only excluding a confession made to a police officer from being used as against the person making it. It is difficult to accept this without putting too great a strain on the plain language of Section 25. It certainly is difficult to see any satisfactory reason why the scope of the two sections should be different, but that is hardly a sufficient reason for not construing each section so as to give effect to its plain language. It seems to be especially undesirable to extend the language of Section 25 beyond its plain meaning when the effect of doing so might tend to encourage those corrupt practices of the police in regard to working for confessions which it is the policy of the law to prevent. There is much force in the observation of Batchelor, J. in the case reported in *Emperor* v. *Hari Singh Ganpat Singh*,[1] that a confession which is inadmissible against the person making it, ought *a fortiori* to be inadmissible against another person implicated by it. The case in *Queen-Empress* v. *Tribhovan Manekchand*,[2] cited by Mr. Napier for the prosecution, is hardly an authority for his contention, as the present question did not arise in that case. The point that West, J. was enforcing was that Section 25 did not refer to the use of a confession in other than a

1. (1910) 12 Bom. L. R. 899. 2. (1884) I. L. R. 9 Bom. 131.

criminal proceeding, that an enquiry under Section 523, Criminal Procedure Code, was not a criminal proceeding, and that a confession could, therefore, be used as an admission in an enquiry under that section.

Since writing the above, I have had the advantage of perusing the judgments which my learned brothers, Wallis and Miller, JJ. are about to pronounce on this question. I am much impressed by the force of the argument that may be drawn against my view from reasoning founded on the history of Sections 24 to 26 which were embodied first in the Code of Criminal Procedure of 1861 and afterwards transferred without material alteration to the Indian Evidence Act of 1872, but I am still inclined, on the whole, to the opinion that effect must be given to the language of Section 25 and that it renders the statements of Arumugam and Somasundaram to Inspector Veeraraghava Aiyar inadmissible.

But as I have already pointed out this can make no difference in the decision of this case, since the majority of the Special Bench expressly state that it is impossible to believe that the evidence of the 6th and 12th prosecution witnesses was either "tutored" by the police or concocted by the witnesses themselves, even if the witnesses' statements to Veeraraghava Aiyar are discarded and if regard is paid only to their statements made a few days later to the Magistrate, the admissibility of which is not, and cannot be disputed. In other words the learned Judges were prepared to act on the evidence of these witnesses as truthful, apart from any corroboration derived from their statements to the Inspector. In these circumstances, it is not open to us as a court of review to go into the facts and consider whether the learned Judges ought or ought not to have arrived at that conclusion.

I would therefore dismiss the petitions that have been presented asking us to set aside the convictions of the accused.

Wallis, J. :—This was a case tried before three Judges of this Court, under Act XIV of 1908, and comes before us on a certificate of the then Advocate-General pursuant to Clause 26 of the Letters Patent that certain points of law which in his opinion were decided by the Judges, or, a majority of them, require to be further considered. Objection was taken at the outset by the Officiating Advocate-General that Clause 26 does not apply to criminal trials before the High Court uuder Act XIV of 1908. Reference was made to Clause 24 conferring extraordinary original criminal jurisdiction on this Court and it was contended that the accused

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before the Court were not "persons brought before it on charges preferred by the Advocate-General or by any Magistrate or other officer specially empowered by the Government in that behalf" so as to come within that clause, but were committed to this Court for trial by a Magistrate acting under the powers conferred upon him by Section 6 of Act XIV of 1908. Assuming that to be so and that the jurisdiction of the Court does not arise under clause 24 but under an Act of the Indian Legislature to which the provisions of the Letters Patent are subject, I am still of opinion that the objection fails, because Clauses 25 and 26 of the Letters Patent, as to points of law being reserved by the Court or certified by the Advocate-General, are perfectly general in their terms and, in my opinion apply equally to all criminal trials before this Court, whether in the exercise of its ordinary or extraordinary original criminal jurisdiction under Clauses 22 and 24 of the Letters Patent or of any future statutory original criminal jurisdiction that may be conferred upon it by a competent legislature. Further, Act XIV of 1908, nowhere, says that Clauses 25 and 26 of the Letters Patent are not to apply to trials under the Act and the presumption is strongly against any intention on the part of the Indian legislature to modify by implication provisions of the Letters Patent issued under an Act of Parliament. I think therefore we were bound to hear and dispose of the application for review however much our so doing may tend to defeat the object of this special legislation, which was to ensure the speedy trial of these cases, or may further interfere with the business of the Court by withdrawing five Judges from their ordinary duties.

The Advocate-General's certificate has been granted under that part of Clause 26 which empowers him to certify that "a point or points of law which has or have been decided by the said court shall be further considered," The certificate purports to have been granted upon certain representations made to the learned Advocate-General and does not show whether the written judgments of the court were before him. They are before us and we have to satisfy ourselves in the first place as to what was actually decided by the majority or the full court as the case may be with reference to each of the points of law and as to whether the decision was erroneous.

The points before us arise on the construction of the Indian Evidence Act, I of 1872, and, as the learned Officiating Advocate-General has argued, it is undoubtedly our duty in construing that Act, which is in the nature of a code, to follow the language of the

sections of the Act, so far as they are clear, and, only in cases of ambiguity or obscurity, to fall back upon the English law upon which it was based.

The certificate as to the *first point* is as follows :—

"That in my judgment the opinion of the majority of the court, that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon, and that it would be open to the court to convict on the uncorroborated testimony of an accomplice if the court was satisfied that the evidence was true, requires to be further considered ; and it requires to be further considered whether Section 133 of the Indian Evidence Act read with Section 114, illustration (*b*), does not merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances."

As to this, I am of opinion that the proposition that it would be open to the court to convict on the uncorroborated testimony of an accomplice in the sense and in the terms in which it is stated in the judgment of the majority of the Judges is correct and does not amount to an error in law. Section 114 of the Indian Evidence Act authorises the court to make certain presumptions of fact. Nine well known maxims are there given as illustrations of the section, the second of which is "the court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars." They are all presumptions which may naturally arise, but the legislature by the use of the word "*may*" instead of "*shall*", both in the body of the section and in the illustrations, shows that the court is not compelled to raise them but is to consider whether, in all the circumstances of the particular case, they should be raised. To make this clearer still, there is the additional provision "But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it," and then as to each of these maxims, instances are given of facts in which the maxim is inapplicable, and, in the case of the maxim now in question, there are two such instances. Now, if Section 114 stood alone, I do not see how it could be said that it was not open to the judges of fact in the particular case, whether judge or jury, to apply or not to apply any of these maxims, having regard to all the facts of the case before them ; and this is expressly stated

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by the draftsman, the last Sir Fitzjames Stephen, in his Indian Evidence Act, at page 174, " Finally it declares in Section 114 that the court may in all cases whatever draw from the facts before it whatever inferences it thinks just." But as regards the particular maxim, Section 114 does not stand alone, because Section 133 provides that " a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." If the law was so laid down in the Act, it was, I have no doubt, because it was the English law as understood at the time and had been the law ever since the decision of *Atwood's case* by the twelve Judges at the close of the 18th century (1 Leach C. C. 464) and because the draftsman and the legislature were not prepared with anything to substitute for it. They were not of course unaware of the well-established practice of courts in England and India according to which, to use the language of Sir Fitzjames Stephen in Article 121 of his Digest of the law of Evidence, published in 1876, " when the only proof against a person charged with a criminal offence is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon such evidence, though they have a legal right to do so." The adoption of the practice in England may be traced in *R.* v. *Wells*,[1] *Rex* v. *Noakes*,[2] *Rex* v. *Addis*,[3] *R.* v. *Webb*,[4] *Rex* v. *Neal*,[5] *Rex* v. *Moores*,[6] and *Regina* v. *Farler*,[7] where it is said to deserve all the reverence of law. In these cases the judges told the jury they ought not to convict on the evidence of accomplices, whether one or more, unless it was confirmed or corroborated not only as regards the offence generally but as regards the particular accused, but the decision was invariably left to the jury ; and in *Reg.* v. *Mullins*,[8] Maule, J. pointed this out and observed that these directions to the jury were not directions on points of law which the jury were bound to adopt, but observations respecting facts to assist the jury in their endeavour to judge of the facts. Then in *Reg.* v. *Stubbs*,[9] the Court of Crown Cases Reserved held that the omission of the court to warn the jury that they ought not to convict one of the accused, as to whom the evidence of the accomplices was not corroborated, was only a departure from the usual practice, which was again stated by the judges, and did not involve any question of law on which the Court of Crown Cases Reserved could review the case under

1. (1829) 1 M. and M. 326.
2. (1832) 5 C. and P. 326.
3. (1834) 6 C. and P. 388.
4. (1834) 6 C. and P. 595.
5. (1835) 7 C. and P. 168.
6. (1836) 7 C. and P. 270.
7. (1837) 8 C. and P. 106.
8. (1848) 7 St. Tr., N. S. 1110.
9. (1855) Dearsly C. C. 555. s. c. 25 L. J. (m. c.) 16.

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11 and 12 Vict., Cap. 78. The law was laid down precisely in the same way by the Court of Queen's Bench in *Reg.* v. *Boyes*,[1] and by Lord Coleridge, L. C. J. sitting with Brett, M. R. and Grove, J. at the Central Criminal Court for the trial of Gallagher *Reg.* v. *Gallagher*,[2] and by Cave and Collins, JJ. in *In re Meunier*.[3] Under the larger powers now given by the Criminal Appeal Act, 1907, the court may now treat a failure to comply with the well-established practice of dirercting juries as to how the evidence of accomplices is to be regarded as having involved a miscarriage of justice within the meaning of Section 4, *Rex* v. *Tate*,[4] but this in no way affects the authority of the above decisions; nor are they affected by the fact stated by Sir Alfred Wills in his 'Circumstantial Evidence,' at page 365, that in one case Baron Bramwell and in another he himself withdrew the case from the jury when there was no corroboration and directed an acquittal. In India at any rate such a course would be a direction at variance with the provisions of the Indian Evidence Act.

As regards the practice in India it has been observed that the danger of acting on the uncorroborated evidence of accomplices is even greater than in England; and before the passing of the Indian Evidence Act it was held by a Full Bench of the Calcutta High Court in *Elahee Buksh's* case [5] on a review of the English authorities that a failure to direct the jury in accordance with the practice was a misdirection on which the conviction could be set aside. With regard to the effect of the Indian Evidence Act on the practice, I cannot altogether agree with the observation which has been sometimes made that the practice was embodied in Section 114, illustration (*b*). The legislature might, of course, have enacted that no one should be convicted on the evidence of accomplices "unless corroborated in some material particular by evidence implicating the accused," as in 48 and 49 Vict., Cap. 69; but this would have been a serious departure from the law as previously understood both in England and in India and in my opinion the legislature were not prepared to go so far but were content with enacting the maxim as ordinarily applicable, whilst leaving it to be applied or not according to the circumstances of the particular case. They must however, I think, have contemplated that the law as declared rather than newly enacted in the section would continue to be applied under the safeguard of the practice; and it is not, I think, surprising that the practice should have

1. (1861) 9 Cox. C. C. 32.
2. (1883) 15 Cox C. C. 291.
3. (1894) 2 Q. B. 415.
4. (1908) 2. B. 680.
5. (1866) 5 W. R. Criminal Rulings page 80.

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continued unaffected by the passing of the Act, as appears from the Indian cases which are fully reviewed in the judgment of Mr. Justice Sankaran Nair. The practice, it must be borne in mind, was one of advising the jury not to convict on the uncorroborated evidence of an accomplice, leaving it to them whether to follow the advice or not, a liberty they undoubtedly possess under Section 114 read with Section 133 of the Indian Evidence Act. The same degree of liberty must necessarily be reserved where the court itself is the judge of fact instead of the jury. In such a case the judge cannot be required consistently with the provisions of the Indian Evidence Act to direct himself not to convict on the uncorroborated evidence of an accomplice. All that he can be required to do is to exercise extreme caution in departing from such a well-established rule of guidance. In such a case, the learned Judges constituting the majority lay it down that it is the duty of the court to bear in mind that it is tainted evidence, to scrutinize it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then if you believe it, act on it even if there is no corroboration in the strict sense of the word. This direction seems to me in accordance with the law laid down by this Court in *Reg.* v. *Ramasami Padayachi*,[1] and *Ramasami Gounden* v. *Emperor*.[2] If the alternative proposition as to special circumstances put forward in the certificate of the learned Advocate-General means more than this and involves an enquiry as matter of law in each case whether there are special circumstances entitling the court to act on uncorroborated evidence I am unable to agree with it. I am of opinion that in the judgment of the majority on this point there is no error of law entitling us to interfere Clause 26 of the Letters Patent.

The *second point* is whether the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial. Reading the certificate with the judgment of the majority of the Court it appears to me that the question for our consideration is whether such previous statements if proved can be regarded as amounting to corroboration of the accomplice in material particulars which the meaning of Section 114, illustration (*b*) of the Indian Evidence Act, as it is scarcely disputed that under Section 157 such statements are admissible in corroboration. I do not think that the courts in England have

1. (1878) I. L. R. 1 M. 394. 2. (1903) I. L. R. 27 M. 271.

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ever attempted to define exhaustively what will amount to corroboration—a question which appears to be rather one of fact depending on a consideration of all the circumstances of the case. In India, the evidence of previous statements made in certain circumstances is admissible under Section 157 of the Indian Evidence Act to corroborate the testimony of the witness. It is therefore admissible evidence in corroboration of the evidence even of a witness who is an accomplice, and I am not prepared to say as the Advocate-General wishes us to say that the previous statements of an accomplice cannot legally amount to corroboration of the evidence given by him at the trial. I think that previous statements admissible as corroboration under Section 157 of the Indian Evidence Act may or may not amount to sufficient corroboration and that whether they will be so or not depends on the facts and circumstances of the particular case. That previous statements may in some cases amount to corroboration where, as in the present case, there are the previous statements of several accomplices was pointed out in *Elahee Buksh's* case,[1] the leading Indian authority. Sir Barnes Peacock, at page 84, observed " But if, two or three persons should be apprehended at different places, at long distances from each other, and should each confess and give a similar account as to the persons associated with them in a particular dacoity, the statement of each, if made under such circumstances as not to raise a presumption of collusion, might be proved in corroboration of his evidence; such statement being admissible as corroborative evidence under Act II of 1855, Section 31" which is the same as Section 157 of the present Act. It is in my opinion clear that in the opinion of the learned Judge the previous statements of the accomplices in those circumstances would amount to sufficient corroboration of their evidence and this is also in accordance with the dictates of good sense. In England, previous statements of witnesses whether accomplices or not, are not generally admissible in evidence; but when admissible in exceptional cases as in regard to assaults on women, they are admitted, it is now settled, as evidence of corroboration—*Rex* v. *Osborne*,[2] and it is clear from the recent decision of the Court of Criminal Appeal in *R.* v. *Ellsom*,[3] that in the opinion of the court such statements, if properly before the court, may, when considered in the circumstances in which they were made, amount to strong corroboration of the evidence of an accomplice. Taken by itself the previous statement may of course be as tainted and untrustworthy as the evidence in the box and

1. (1866) 5 W. R. Crl. R. p. 80.
2. (1905) 1 K. B, 551.
3. (1905) 76 J. p. 28.

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not supply any real corroboration; but on the other hand the circumstances in which it was made may afford strong corroboration of its truthfulness apart from the credibility of the accomplice, as in the case put by Sir Barnes Peacock which has now been inserted as an illustration to Section 114 (*b*) of the Indian Evidence Act—"A crime is committed by several persons, A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts *corroborate* each other in such a manner as to render previous concert highly improbable." In such a case the previous statements not only corroborate each other but also the sworn statements in the box, and they are evidently regarded as confirming the tainted evidence of the accomplices and making it right to act on that evidence. It is true that they are given in the section rather as facts rendering corroboration unnecessary than as amounting themselves to corroboration, but this, it appears to me, is a distinction which makes no real difference, as the court is invited to believe the evidence and act upon it. The previous statements received and acted upon by the majority of the learned Judges in this case, both those made to the Inspector and those made to Mr. Cox, were in their opinion of this character and in my opinion the learned Judges were justified in receiving and acting upon them as corroboration. They have not in my opinion misdirected themselves at all in this respect, and that being so, we have no authority, sitting here not as an appellate court, but as a court of error under the Letters Patent, to call in question the conclusions they have arrived at on evidence properly before them. With regard to the decisions in *Reg.* v. *Malapabin Kapana*,[1] and *Queen-Empress* v. *Bepin Biswas*,[2] I do not think they can be taken as laying down as matter of law that previous statements of accomplices cannot amount to sufficient corroboration of their testimony, and if they do I think they go too far. A direction to that effect by a Sessions Judge was made the ground of an appeal against acquittal by the Bengal Government in 1898, *Empress* v. *Bhairab Chunder Chuckerbutty*,[3] but the case went off on another point.

The *third point* is whether the previous statements of the 6th and 12th witnesses for the prosecution to Inspector Veeraraghava Aiyar, the 31st witness, were admissible as not made to an authority legally competent to investigate the fact within the meaning of Section 157 of the Indian Evidence Act. It is not suggested that

1. (1874) 11 Bom. H. C. R. 196. 2. (1884) I. L. R. 10 Cal. 970.
3. (1898) 2 C. W. N. 702.

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when the statements were made the Inspector was competent to investigate the charge of conspiracy, a non-cognizable offence, on which the accused have been convicted, but it was contended for the prosecution but denied for the defence that he was competent to investigate the murder of Mr. Ashe and that it was in the due course of that investigation that these statements were elicited. Whether this would be sufficient depends on the construction of the words "legally competent to investigate the fact" in Section 157. Sections 156 and 157 deal with the corroboration of witnesses as to relevant facts, and reading the two sections together, I think Section 157 should be read thus, as if the words in brackets were there, "In order to corroborate the evidence of a witness (as to a relevant fact) any former statement made by the witness as to the same fact before any authority competent to investigate the fact may be proved." It seems to me that under the section the evidence of witnesses in the box as to relevant facts may be corroborated by proof of previous statements as to the same facts if made before an authority legally competent to investigate such facts. It cannot, I think, be questioned that an Inspector investigating the murder of Mr. Ashe was legally competent and bound in the course of his investigation to elicit the statements now in question; and being so, I think the provisions of the section were so far satisfied and that to make the previous statements admissible it was not necessary that the Inspector should have been legally competent to investigate the conspiracy of which the accused have been convicted. As to whether the Inspector to whom the statements were made was in fact legally competent to investigate the murder of Mr. Ashe, Section 156 of the Code of Criminal Procedure provides that any officer in charge of a police station "may, without the order of a magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try" and Section 551 provides that "Police Officers superior in rank to an officer in charge of a police station may exercise the same powers, throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station." The learned judges forming the majority have found that there can be no question that the Inspector is a police officer superior in rank to an officer in charge of a police station, and also that as a member of the Provincial Department of Criminal Investigation, the "local area" within the meaning of Section 551 of the Code of Criminal Procedure, to which he was appointed, was the Presidency of Madras. The word Provincial is undoubtedly used as equivalent

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to the Presidency of Madras, which is one of the Provinces of British India; and it is a matter of common knowledge that the department was constituted in pursuance of recommendation 35 of the Police Commission, 1902-1903, which is as follows:—"That there should be constituted in each province a Criminal Investigation Department for the purpose of collecting and distributing information regarding organized crime, and to assist in the investigation of crimes when they are of such a special character as to render their assistance necessary." Such investigation would necessarily take place in any part of the presidency in which these crimes should occur, and in these circumstances I think the Presidency may well be held to be the "local area" to which the seven Inspectors in the Department on whom the work of investigation must necessarily fall are appointed. The assassination of a Collector—a crime happily unprecedented in the history of the Presidency for over fifty years—was obviously a crime of such a special nature as to render the assistance of the department necessary. The Inspector in this case had come down with the head of his department in connection with this murder. I think his evidence and the G. O. No. 913, Judicial, dated 2nd July 1908, which has been put in defining the relations between the Officers of the Criminal Investigation Department and the ordinary Police Officers of the Criminal Investigation Department and the ordinary police officers in the various districts of Presidency, was evidence sufficient to support the finding—though not perhaps so full as if this objection had been taken when the statements were tendered in evidence and had not been reserved for the argument after the evidence for both sides had been closed. I do not think that these are matters which we should go into sitting here as a court of error under Clause 26 of the Letters Patent. I am also inclined to think that the word 'investigate' in Section 157 of the Indian Evidence Act cannot be read as limited to investigation under the Code of Criminal Procedure, that the Inspector had been brought down from Madras specially to investigate the murder of Mr. Ashe, and that he was not only legally competent but under a duty to investigation to record the statements now in question. In the result, I hold there is no ground for interference under this head.

The two remaining points certified by the Advocate-General whether confessions by an approver to a police officer are not excluded both by Section 25 of the Indian Evidence Act and Section 162 of the Code of Criminal Procedure may I think conveniently be dealt with together and the latter first, because as poinetd out in

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Queen-Empress v. *Bampu Lal.*[1] These three sections (Sections 25 and 26 of the Indian Evidence Act, 1872, and Section 162 of the Code of Criminal Procedure, 1898) which were designed to guard against improper practices on the part of the police in obtaining statements from witnesses and confessions from the accused first made their appearance together as Sections 145 (now 162), 148 and 149 of the Criminal Procedure Code of 1861; and Sections 148 and 149 of that Code have since been transferred without material alterations to the Indian Evidence Act, 1872, where they appear as Sections 25 and 26; and as observed by Lord Blackburn in *Mayor of Portsmouth* v. *Smith,*[2] "where a single section of an Act is introduced into another Act, it must be read in the sense which it bore in the original Act from which it is taken, and consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act." This it seems to me is the proper method to apply even where, as here, the sections have been introduced into a measure of codification, and I am unable to attach much force to arguments depending on the position of Sections 25 and 26 in the Indian Evidence Act. As to whether the previous statements of the approvers to the police were inadmissible under Section 162 of the Code of Criminal Procedure, 1898, as previous statements of witnesses to the police, the Code of 1861, Section 145 (now section 162) provided for the oral examination of witnesses by the police and permitted these statements to be taken down in writing "provided that any statement so reduced into writing shall not be signed by the person making it, nor shall it be treated as part of the record or used as evidence." Such statements were no doubt usually taken down in writing, and there does not appear to have been any attempt made to give oral evidence of them to corroborate the witnesses under the Codes of 1861, 1872 or 1882, which in this respect were not materially different. By Act X of 1886, Section 6, Section 162 of the Code of Criminal Procedure was altered by inserting into the section the word "shall" as shown in brackets. "No statement, other than a dying declaration made by any person to a police officer in the course of an investigation under this chapter shall, if reduced to writing, be signed by the person making it, or (shall) be used as evidence against the accused." As thus altered the section appears to go still further and to make statements to the police inadmissible whether they were taken down in writing or not. In 1898, an attempt was made by the prosecution

1. (1884) I. L. R. 6 All. 509. 2. (1889) L. R. 10 A. C. 364 at p. 371.

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to use the previous statement to the police of an approver to corroborate him, but the statement was rejected as inadmissible under Section 162, *Queen-Empress* v. *Bhairab Chunder Chuckerbutty*,[1] and if the section, as it then was, had not been altered, there can be no doubt the statements now in question would have been inadmissible. In the Code of 1898 which came into force in 1899 the provisions of Section 162 were altered. The main alteration as pointed out in *Dadan Gazi* v. *Emperor* [2] was made for the purpose of setting at rest the controversy as to the circumstances in which the accused were entitled to have access to and make use of such previous statements of the witness to contradict them—a course the police had endeavoured to prevent by taking them down in their diaries which are privileged under Section 172. This was dealt with by a new *proviso* entitling the accused to require the court to refer to such previous statements, and if the court thinks it expedient in the interests of justice to direct copies to be given to the accused. But as against this concession to the accused, the body of the section was altered in such a way as to modify the absolute exclusion of such statements as evidence for the prosecution, contained in the Code of 1882 as modified in 1886. The present section runs thus:—"No statement made by any person to a police officer in the course of an investigation under the Chapter (XIV) shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence." Here it is only the writing that is excluded. The change of language must, I think, have been deliberate and I am constrained to agree with the decision of the learned Judges, and with *Fanindra Nath Banerjee* v. *Emperor* [3] and the judgment of Karamat Husain, J. in *Rustam* v. *King Emperor*,[4] that oral evidence of such statements is not inadmissible. On this point, am of opinion that there was no error in law.

Going back now to the *fourth point* whether the statements are inadmissible, not under Section 162 of the Code of Criminal Procedure as previous statements of witnesses to the police, but as confessions made to the police under Section 25 of the Indian Evidence Act which provides that "no confession made to a police officer shall be proved as against a person accused of an offence," the question is, does the section mean that no confession to a police officer by an accused person is to be used against him, or that it is not to be used against others either? The next Section 26 relating to confessions made by accused persons in the custody of the police unless in the immediate presence of a Magistrate renders them inad-

1. (1898) 2. C. W. N. 702.
2. (1903) I. L. R. 33 C. 1023.
3. (1908) I. L. R. 36 C. 281.
4. (1910) 7 A. L. J. 468.

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missible as against such persons. The two learned Judges forming the majority see no reason why any difference should be made between the two sections, and read Section 25 as also relating to confessions made by a person accused of an offence to the police, and as rendering such confessions inadmissible only as against them. Sankaran Nair, J. on the other hand thinks that confessions made to the police may have been considered to require more stringent provisions than confessions made by accused persons when in police custody to others. In accordance with the rule already stated, I proceed to consider the meaning and effect of these sections as first enacted in the Code of Criminal Procedure, 1861, Section 145 of that Code (now Section 162) as already pointed out provides that statements of witnesses to the police if reduced to writing shall not be used as evidence. The following section then deal with the confessions of accused persons to the police in the courses of investigations by the latter. Section 146 forbids the police to offer any inducement by threat or promise to an accused person to make any disclosure or confession. Section 147 forbids the police to record any statement or any admission or confession of guilt which may be made before him by an accused person. Section 148 (now Section 25 of the Indian Evidence Act) then provides that "no confession or admission of guilt made to a police officer shall be used as evidence against such person accused of any offence," and Section 149 that " no confession or admission of guilt made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate shall be used as evidence against such person." As I have already said, confession in these sections appears to mean confession by an accused person to the police in the course of an investigation under the chapter, and as before the passing of Section 30 of the Indian Evidence Act of 1872 confessions of accused persons could not be used against co-accused, such confessions could only be evidence against the accused persons making them, or to corroborate their evidence when they turned approvers, by treating their confessions as previous statements made by the witnesses under Section 31 of Act II of 1855 since reproduced as Section 157 of the Indian Evidence Act 1872.

Now it may be said on the one hand that as by Section 145 of the Criminal Procedure Code of 1861 immediately preceding, the legislature had made an exception in the general law regarding the use of previous statements as corroboration restricting the use in evidence of such previous statements if made to the police, whether

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they amounted to confessions or not, and practically excluding them, it is not likely that they intended in Section 148 to introduce a further exception as to the use of previous statements which amount to confessions; that, as observed by Miller, J. if any such fresh provision had been intended, it would have extended to exculpatory statements by accused persons as well as to confessions, and to confessions made by accused persons whilst in police custody under Section 149 (now Section 26 of the Indian Evidence Act) as well as to confessions to the police themselves coming within Section 148 (now Section 25 of the Indian Evidence Act). It may be said further that the language of Section 148 "no confession or admission of guilt made to a police officer, shall be used as evidence against a person accused of any offence" is susceptible of the meaning that no confession made by such a person to the police should be used against him, and that in this respect the scope of the two Sections 148 and 149 is the same, although in the latter the draftsman dealing with more complicated provisions has expressed his intention with greater precision. These considerations appear to me to have considerable force in favour of a restrictive construction of the section. The result of such a construction, as already explained, would be that confessions regarded merely as previous statements to the police were practically excluded as corroborative evidence down to 1886, and absolutely excluded from 1886 down to 1898, and only became admissible owing to the change in Section 162 of the Code of 1898.

On the other hand, as against this view there is the fact that the terms of the prohibition in Section 148 of the Code of 1861 and now in Section 25 of the Indian Evidence Act are prefectly general and as observed by Benson, J., a construction which renders statements which are inadmissible against the persons making them admissible against other persons is not one to be favoured. It is also perhaps worthy of note that confession to the police which come under Section 148 were forbidden to be recorded by Section 147, whereas there was no such prohibition as regards confessions made by persons in police custody which come under Section 149. The question then is whether giving due weight to all these considerations, as I have endeavoured to do, there is sufficient to require the court to put a restrictive construction upon the section or to justify it in so doing. I have felt great doubt upon this point especially in view of the difference of opinion among the members of the Court; and in these circumstances I think the safer, as it is certainly the simpler

course is to read the words of the section in their natural meaning without putting any restrictive interpretation upon them, and so reading them I hold that these confessions were inadmissible even as corroborative evidence under Section 25 of the Indian Evidence Act.

I am, however, of opinion that the rejection of the statements made by the two approvers to the Inspector cannot affect the result of the trial. It has been held in a long catena of Indian cases that, in reviewing a case under Clause 26 of the Letters Patent, it is the duty of the court when it finds there has been a misreception of evidence to apply the provisions of Section 167 of the Indian Evidence Act, and not to reverse the conviction if it shall appear to the court that "independently of the evidence objected to and admitted there was sufficient evidence to justify the decision," the decision here being that of the original tribunal. Hitherto this jurisdiction under Clause 26 has only been exercised in jury cases where of course no reasons were given for the verdict, and the court of review was perforce bound to go into the evidence itself for the purpose of seeing whether or not the remaining evidence justified the decision of the jury. In the present case under Section 11 (3) of the Criminal Law Amendment Act, 1908, the decision is that of the majority of the Court, and the reasons for that decision have been given in a most careful and elaborate judgment. Now discarding the previous statements of the two approvers to the Inspector, we find that, within a few days after these statements, the approvers made statements to the same effect before a Magistrate, Mr. Cox, as to which no question of inadmissibility arises, and the learned Judges have observed that, even if the statements to the Inspector are discarded and only these recorded by Mr. Cox are considered, they find it impossible to accept the defence theory that the approver's story was concocted or tutored, and, from a perusal of the Judgment, it is perfectly plain that discarding the statements to the Inspector they accepted the evidence of the two approvers as generally truthful, and acted upon it as they were entitled to do. Here I may observe that the learned Judges had before them the fact, which was properly in evidence, that before their statements to Mr. Cox the approvers hade made still earlier statements to the Inspector at a time and under circumstances which in their opinion negatived the concoction at that stage of such a story as they afterwards told to Mr. Cox and in the witness-box; and they were, I think justified in a view of all the circumstances in rejecting the suggestion of subsequent concoction

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in the interval between the two sets of statements, unless supported by a reference to the earlier statements which were available to the defence under the *proviso* to Section 162 of the Code of Criminal Procedure, and would not, as we now know, have supported it. If then the Court had rejected the statements made to the Inspector and still convicted the accused, it would have been impossible for us to say that there was not sufficient evidence to justify their decision, and it appears to me to be equally impossible for us to say so, when in effect the learned Judges tell us that though considering the evidence admissible they did not consider it necessary to base their decision upon it and were prepared to convict without it.

I think therefore the application must be dismissed.

Miller, J.—On the preliminary question I do not think I can usefully add anything to what has already been said. I agree with the opinions of Benson and Wallis, JJ.

On the *first point* in the Advocate-General's certificate I have a few words to say but having had an opportunity of perusing the judgments written by some of my learned colleagues I do not think it necessary for me to discuss the decided cases bearing on the subject. On the effect of the decisions I agree with what has just been read by Wallis, J.

I consider that the majority of the Special Bench have correctly laid down the law, and that it is not the law that special circumstances must be found to exist before an accomplice's statement can be acted upon without corroboration. To hold so as a matter of law would, it seems to me, deprive the court of the discretion given by Section 114 of the Indian Evidence Act to raise or not to raise the presumption—would in effect substitute the phrase 'shall presume' for 'may presume' in that section.

I do not dissent from the decisions which have held that ordinarily as a matter of practice a court should not accept the uncorroborated evidence of an accomplice as sufficient evidence to support a conviction, but it is impossible consistently with the Indian Evidence Act to hold that as a matter of law the presumption must be raised, and rebutted by special circumstances or by corroboration.

I am not sure that the conclusion of Sankaran Nair, J., stated at page 61 of the printed judgments, differ materially from those of the other two learned Judges, but if he intended to lay it down as law that a conviction is illegal which is based upon the uncorrobo-

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rated evidence of an accomplice, unless something which amounts in law to a 'special circumstance' be found by the judge or jury, then it seems to me he goes beyond the statement of the English law accepted from 'Taylor on Evidence' by the L. C. J. in *R.* v. *Tate*,[1] for that statement, so far as I am at present concerned with it, is only to the effect that the respect habitually paid by Juries to the advice of judges has given rise to a settled practice not to convict upon the uncorroborated evidence of an accomplice except in very special circumstances. Consequently, as I understand it, judges are bound by law to advise juries to adhere to this practice, but it does not follow that juries are bound as a matter of law to do so.

In the present case, the majority of the Special Bench have given reasons for deeming the accomplice to be credible witnesses in the circumstances of the case, and Mr. Govinda Raghava Aiyar had consequently to argue that 'special circumstances' are circumstances differing in quality from those which are ordinarily applied as tests of the credibility of witnesses on whom there rests no taint of complicity in the crime with which the accused is charged.

To accept this contention would, to my mind, be to introduce into the law on this subject an additional and entirely undesirable and unnecessary element of artificiality; the contention itself is perhaps an illustration of the danger of adopting the suggested rule as a rule of law.

I concur on the *second point* with the majority of the Special Bench, when they hold that the previous statements of accomplices are admissible under Section 157 of the Indian Evidence Act to corroborate their testimony given at the trial.

It was not denied that such statements cannot having regard to Section 157 of the Indian Evidence Act, be excluded if made in the circumstances set forth in the section, and inasmuch as the section expressly admits them in order to corroborate the testimony of a witness, it necessarily follows that they are legal corroboration of the evidence given at the trial.

The words of Section 157 of the Indian Evidence Act cannot be controlled by the illustrations to Section 114, a section which treats of presumptions which may be made: but the evidence admitted under Section 157 may be so far affected by the illustrations to Section 114 that the corroboration afforded by it might, conceivably, not be in law sufficient corroboration to justify the

1. (1908) 2 K. B. 680.

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court in acting on the evidence given at the trial. Consequently I must take it, I think, that the Advocate-General suggests for our consideration the view that the phrase 'corroborated in material particulars' in illustration (*b*) to Section 114, is a technical term connoting a corroboration different from that of Section 157, in fact a corroboration by independent or untainted evidence. I am unable to find reason to accept this view as a matter of law. The evidence, I conclude, is admissible as corroboration and whether it is sufficient or not to justify the court in believing the evidence given at the trial is a question of the weight to be given to it and not a question of law.

I do not think that I can usefully add much to what has already been said upon this point by Wallis, J. whose judgment I have had an opportunity of reading: I concur entirely in his conclusions as to the law.

I may point out that the learned Judges in *Queen Empress* v. *Bepin Biswas*,[1] declined to consider whether the rule should be 'extended' to the case of previous statements made before arrest, and that Sankaran Nair, J. (at page 63) is prepared to hold that there might possibly be a difference where the previous statement of an accomplice is made at a time when there was no inducement to make a false statement and in circumstances which indicate that it is true.

But if previous statements made under some circumstances are sufficient corroboration, then it seems to me very difficult to lay down as a matter of law the rule suggested by the Advocate-General, simply because, in our opinion, such cases are fewer than those in which the previous statements are valueless. And there is no need for us to try to do so: the discretion given to Judges and juries in weighing evidence is all that is required, and no rule is in my opinion wanted except to secure that Judges and Juries dealing with facts shall have fully before them the defects inherent in the evidence of accomplices and the tests which experience has shewn to be the best aids in estimating its real value in the particular case.

I see danger and not safety in ruling out as inadmissible in the case of accomplice witnesses any tests of credibility which are available in the case of other witnesses whether the test applied tends to confirm or to discredit the evidence.

1. (1884) I. L. R. 10 Cal. 970.

The third point.—I do not think that our decision upon points 3, 4 and 5, can affect our judgment on the case, because it seems to me quite clear from their judgment that the Chief Justice and Ayling, J. were prepared to arrive at the conclusion at which they did arrive whether the evidence of Veeraraghava Aiyar proving previous statements of the accomplices, Arumugam and Somasundram, is admitted or rejected. It seems therefore, to me really unnecessary to express any opinion upon these three points, but I follow my learned colleagues in doing so.

So far as the 3rd point is concerned the decision of the majority is correct, if Inspector Veeraraghava Aiyar was legally competent to investigate the 'fact' within the meaning of Section 157 of the Indian Evidence Act: that is for the most part a question of fact and the evidence bearing on this point was put before us at the hearing. It shows that the Inspector was deputed by Mr. Thomas, the Inspector would be legally competent to make the investigation for which he was deputed. In the absence of any statement by Mr. Thomas to the contrary I consider that the deputation to assist in making of searches equivalent to an authority to the Inspector to assist at an investigation: the making of searches is investigating within the meaning of that word in the Criminal Procedure Code, if that be necessary; the investigation in question was not the collection of evidence to determine who murdered the Collector of Tinnevelly; the assassin had killed himself and no investigation was wanted: the investigation was to collect evidence to establish a charge of abetment of the murder, to ascertain who were the instigators of the crime. The existence of the conspiracy alleged by Arumugam was relevant to the issues involved in that investigation and the statement of Arumugam was therefore relevant to that investigation, and it makes no difference that the conspiracy alleged by Arumugam has not been shewn at the trial to have been a conspiracy of abettors of the particular murder in question. Whether 'the fact' of Section 157 of the Indian Evidence Act be here the truth of the statement of Arumugam or the existence of a conspiracy to murder, Veeraraghava Aiyar was competent to investigate it so far at any rate as he could do so in the course of his searches at Tuticorin.

Of course it is possible that his authority was only to guard the door or make or copy a list of papers or carry boxes or dig up floors, but I am not prepared to presume that that was what was expected of an officer of the rank of an Inspector of the Criminal Investigation Department. I therefore find nothing in the evidence

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put before us to require me to hold that the Chief Justice and Ayling, J. were in error on this point.

The fourth point:—On this point I am of opinion that there is no error of law in the judgment of the Chief Justice and Ayling J.

I agree with those learned Judges that there is no difference in the object of Sections 25 and 26 of the Indian Evidence Act; that both are aimed at the same mischief: and I have not been satisfied that that there is any substantial reason for attributing to the legislature an intention to place a confession made to a police officer on a different footing from one made by a person in the custody of the police. Consequently I approach the consideration of this question from the point of view that, as Section 26 applies only to the proof of a confession as against its maker, so it should be held that Section 25 has a similar scope unless we are bound by its language or for some other reason to give it a wider application. Now Sections 25, 26 and 27 of the Indian Evidence Act were imported into the Indian Evidence Act from the Criminal Procedure Code of 1861, where they were placed among the provisions dealing with the powers of police officers in making investigations into cases of alleged offences. So far as I know there was at that time, that it is in 1861, no provision in the law of evidence as administered in India, corresponding to Section 30 of the Indian Evidence Act of 1872; and so there is no apparent reason why it should suggest itself to the framers of the code that it was necessary to provide for the case of the use of a confession as against any person other than the person who made it. These sections of the Code of 1861 were not dealing with the question of witnesses in criminal trials or with a consideration of what might or might not be corroboration of the testimony of witnesses in such trials and Sections 147, 148, 149 and 150 of that Code are clearly intended to render it, so far as possible, useless for police officers to extract confessions from accused persons for use at their trial. They are not and could not be meant to prevent the taking of confessions by the police in all circumstances, even as aids to investigation: Section 147 permits the police officer to make a note for his own information of a confession made to him.

By Section 147 of the Code of Criminal Procedure of 1861 a police officer is prohibited from making a record of a confession, except for his own information, when the confession is made by "a person accused of any offence," that is to say, as I understand it, a person against whom there is a 'case' which is being investigated under Section 135 (*vide* Section 144). Section 148 forbids the

use of any confession made to a police officer, as evidence against 'a person accused of any offence,' that is to say, or so it seems to me, the same person whose confession the police officer is forbidden to record except for his own information. Then Section 149 makes a similar prohibition of the use as evidence against the maker of a confession made by any person while he is in the custody of the police.

The case having been investigated, the person accused of any offence is put on his trial: the confessions made by him to the police officer, or while in custody of the police officer, are not to be used as evidence against him.

That, it seems to me, is the natural meaning of these provisions, and the only meaning appropriate to them having regard to their position in the Code of Criminal Procedure. In short they have nothing to do with the statements of witnesses. I am not at all pressed by the difference in language between Section 148 and Section 149 of the Code of Criminal Procedure of 1861, because I think a careful examination of the two sections will shew that, in order to express clearly and at the same time correctly and elegantly the particular position dealt with by Section 149, it may very well have been deemed necessary to depart from the brief and succinct diction of Section 148. I think then there can be very little doubt that in the Code of 1861, both these sections were intended to prevent the use, as evidence against the maker, of confessions made actually or in effect to police officers.

Then the sections are imported without material alteration of language, into the Indian Evidence Act of 1872, and I am unable to find any reason to give them a more extended meaning than they bore in the Code of 1861. For *prima facie* the law of evidence does not allow the use of a confession, which is a form of admission, as evidence against any person except the maker; Section 30 provides for a particular and exceptional case: and that being so there seems no reason to suppose that the legislature in transferring Sections 148 and 149 of the Criminal Procedure Code of 1861 to the Indian Evidence Act, had any intention of extending their application. On the other hand, had there been any such intention I should have expected to find an alteration in the language of Section 26 in the Indian Evidence Act, so as to extend that section to cases other than that of the maker of the confession.

It has to be remembered too that the confession of a witness is not used as confession at the trial of some one else: it is not used as an admission: it is put in to corroborate or to contradict the

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witness: and Section 25 of the Indian Evidence Act was not, as I understand the matter, concerned with the statements of witnesses. If used for corroboration the confession is put in to shew that certain allegations made by the witness at the trial of those persons, were made by him at some earlier period, at a time when or under circumstances in which it may be regarded as somewhat probable that he might have been telling the truth. And I am unable to see that it is more dangerous to allow a witness to be corroborated by a self-incriminating statement made to a police officer than by a self-exculpatory statement to the same officer.

On the other hand Section 30 seems to indicate that in the view of the legislature a man is less likely to make false accusations against others when he is incriminating himself as well as them. I agree, then, with the dictum of West, J., in *Queen-Empress* v. *Tribhovan Manekchand,*[1] and am of opinion that the Chief Justice and Ayling, J. were right as regards this point of the Advocate-General's certificate.

I may add that I do not think the cases dealing with the Section 30 have any great bearing on the question which I am discussing. It is true that the learned Judges in one case, *Emperor* v. *Harisingh Ganpatsing,*[2] remark that their conclusion is confirmed by the language of Section 25, but it is impossible from this to draw the inference that they considered the question we have to deal with, while it is quite possible to arrive at their conclusion by reading Sections 30 and 25 together without affecting the present question in any way.

Fifth point.—On this point I desire only to say that the language of the section and the history of the various amendments made from time to time constrain us to accept the law as laid down by the learned Judges of the Special Bench.

There is no ground on which we can interfere with the decision of the Special Bench and the petitions of the accused must be dismissed: and as I have said the same result is arrived at if I am wrong, and if the evidence of Veeraraghava Aiyar is excluded *so far* as it relates to the previous statements made by Arumugam and Somasundram.

Abdur, Rahim J.—Fourteen persons were tried on charges under Section 121 A, Indian Penal Code, and Section 302, Indian Penal Code, read with Sections 109 and 111, by a Special Bench of three learned Judges (the Chief Justice, Sankaran Nair and Ayling,

1. (1884) I. L. R. 9 B. 131 at p. 134. 2. (1910) 12 Bom. L. R. 899.

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JJ.) constituted under the provisions of the Indian Criminal Law Amendment Act (XIV of 1908) which provides for the speedy trial of certain offences. The trial was held without a jury in accordance with Section 11 of the Act, and the Bench unanimously found that the charge under the latter sections of abetment of murder was not proved against any of the prisoners and acquitted them all under that head of the indictment. But upon the remaining count, *viz.*, the charge of conspiring to wage war against the King-Emperor, the learned Judges did not agree with respect to the case against all the accused : the Chief Justice and Ayling, J. came to the conclusion that the charge was substantiated against 9 out of the 14 persons tried but not against the rest (*i. e.*, the 9th, 10th, 11th, 12th and 13th accused) while Sankaran Nair, J. was of opinion that the Crown failed to establish the case not only against the five persons acquitted by the majority of the Bench but also against four other accused persons (*viz.*, those mentioned and the 3rd, 4th, 5th, and 7th.) The Judges were unanimous in finding four of the prisoners guilty, namely, the 1st, 2nd, 6th and the 14th accused. Under Section 11 of the Act referred to judgment was pronounced in accordance with the opinion of the majority and sentences were passed accordingly.

The case is now brought before us under Article 26 of the amended Letters Patent of this Court upon a certificate granted by the Advocate-General on a petition presented to him by the accused Nos. 3, 4, 5, 6 and 7. The present Advocate-General who appeared for the Crown has taken the preliminary objection that Article 26 of the Letters Patent has no application to a case tried in accordance with the provisions of the Indian Criminal Law Amendment Act and we have therefore no jurisdiction to review the case. That Article must be considered in connection with articles 22, 23, 24 and 25. Article 22 defines the local limits of the ordinary original criminal jurisdiction which mainly coincides with the local limits of its ordinary civil jurisdiction and Article 23 empowers the High Court in the exercise of such jurisdiction to try all persons brought before it in due course of law. Then article 24 declares that in addition to its ordinary original criminal jurisdiction the High Court shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any court subject to the superintendence of the High Court—the prisoners here answer the description—and shall have authority to try at its discretion any such person brought before it on charges preferred by the Advocate-General or by any

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Magistrate or other officer especially empowered by the Government in this behalf. Article 25 next lays down that the accused has no right of appeal to the High Court from any sentence or order passed in any criminal trial before the courts of original criminal jurisdiction which may be constituted by one or more judges of the High Court but that it shall be at the discretion of any such court to reserve any point or points of law for the opinion of the High Court. Article 26 provides that on such a point or points being so reserved or on its being certified by the Advocate-General that in his opinion there is an error in the decision of a point of law decided by the court of original criminal jurisdiction or that a point of law which has been decided by the said court shall be further considered, the said court shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point of law, and thereupon to alter the sentence passed by the court of original jurisdiction and pass such judgment and sentence as to the High Court shall seem right. It is argued on behalf of the Crown that the court of original criminal jurisdiction referred to in Articles 25 and 26 refer to the court exercising the ordinary and extraordinary original criminal jurisdiction mentioned in Articles 22, 23 and 24 and that the trial in this case was not held in the exercise of either description of jurisdiction. I think there is force in the first part of this argument as both articles 25 and 26 speak of *the* court of original criminal jurisdiction, apparently meaning the court exercising the ordinary or extraordinary criminal jurisdiction of the High Court mentioned in Articles 22, 23 and 24. In fact these articles confer such plenary jurisdiction on the High Court that it may well be inferred that it was not within the contemplation of the Letters Patent that the High Court should be called upon to exercise original criminal jurisdiction in any case not covered by these articles. It is, however, conceivable, though very unlikely, that the Indian Legislature may confer original criminal jurisdiction on the Madras High Court in cases which do not fall within the ambit of its ordinary or extraordinary jurisdiction. To these cases Article 26 would not perhaps be applicable, but I have no hesitation in holding that the contention of the Advocate-General that the present is such a case is clearly untenable. The prisoners are all residents of the Madras Presidency and over them the Court undoubtedly have jurisdiction under the first part of Article 24. It is therefore apparently not a case in which the High Court has no jurisdiction under the Letters Patent but derives its jurisdiction from

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a special statute. Nor is there anything in the Indian Criminal Law Amendment Act to suggest that the legislature was conscious that it was conferring a jurisdiction on the High Court which it did not already possesss. The Act proceeds on the assumption that the Magistrate who held the enquiry should commit the persons charged to the High Court to whose superintendence the Magistrate is subject (see Sections 3 and 5). It no doubt makes a radical change in the procedure to be pursued in the trial at the High Court by enacting that the trial shall not be by a jury and to this extent the change is no doubt one affecting the forum of trial. But it does not purport to affect the jurisdiction of the High Court as conferred upon it by the Letters Patent; it only regulates the manner of the exercise of its jurisdiction. That the question whether a trial should be held by a judge and a jury or otherwise is not to be treated as one relating to jurisdiction is also amply indicated by the fact that it is not Articles 22, 23 and 24 of the Letters Patent, by which jurisdiction is given to this Court in criminal cases, that require that trials should be held by a judge and a jury; that matter is dealt with by Article 38 which regulates the procedure in trials. The argument on which the Advocate-General lays the most emphasis is that the High Court in its extraordinary jurisdiction can only try such persons as are brought before it 'on charges preferred by the Advocate-General'—which is not the case here—'or by any Magistrate or other officer expressly empowered by the Government in that behalf,' and that in this case the Magistrate who committed the accused for trial to the High Court could not be taken to have preferred the charges within the meaning of Article 24 as he did not derive his authority to do so from the Government but from the legislature. It does not seem to me that there is any force in this contention. The Sub-Divisional Magistrate of Tinnevelly who committed this case was undoubtedly appointed to his office by the Government and it was by virtue of that office that he took cognizance of the offence and preferred charges against the accused in accordance with the provisions of the Criminal Procedure Code. Then the Local Government under Section 2 of the Indian Criminal Law Amendment Act directed that the provisions of that Act should apply to those proceedings, that is, among other matters, the Magistrate who had taken cognizance of the offence should send the accused to the High Court for trial upon charges to be framed by him. This is therefore clearly a case in which the Magistrate was 'expressly empowered by the Government' to prefer the charges on which the accused were tried by the High Court, even giving a

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narrow and literal meaning to these words. But I may observe that the words 'expressly empowered by the Government' were not in my opinion intended to be used in a narrow sense. If the contention of the Advocate-General were well-founded, there could be no doubt that when a European British subject is charged with an offence punishable with death or transportation for life and the District Magistrate enquires into it and commits the accused to the High Court under the provisions of Sections 443 and 447, Criminal Procedure Code, such Magistrate would not be deemed to be 'expressly empowered by the Government' to prefer charges against the accused within the meaning of Article 24 of the Letters Patent but I do not think the application of article 26 to such a case has ever been or can be doubted. I may mention that in *Queen Empress* v. *O'Hara*,[1] which was a case of that nature, no such objection so far as it appears from the report was taken to the jurisdiction of the High Court to review the case under Article 26.

It has further been urged by the Advocate-General the object of the Indian Criminal Law Amendment Act is to provide for the speedy trial of offences of a particular description and if Article 26 of the Letters Patent applied this object would be frustrated. I do not think there is any force again in this argument. The mode in which a speedy trial was to be secured is specified in the Act itself, namely, by providing that the enquiry by the Magistrate should be held in the absence of the accused who is not to be represented at all during the enquiry, that the commitment is to be to the High Court instead of to the District Sessions Court so as to obviate an appeal, and the trial is not to be with a jury. If in addition, the legislature wanted to enact that it would not be open to the Special Bench to obtain the opinion of the High Court on any question of law however vital in its bearing on the trial in which such Bench may entertain a doubt, or that it should not be within the power of the High Court to prevent a miscarriage of justice due to an erroneous decision on a point of law, however manifest, one would expect such a declaration to have been made in absolutely clear and unambiguous language.

I over-rule the preliminary objection.

I purpose to consider the questions raised by the first two paragraphs of the certificate together. The first paragraph requires us to consider what the law is on the subject of an accomplice's evidence and whether the law is correctly stated in the judgment of

1. (1890) I. L. R. 17 C. 642.

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the majority of the Special Bench, and the second paragraph raises the question whether the majority of the Court are right in their view that the previous statements of an accomplice can be regarded as such corroboration of his evidence in court as the law requires.

I may observe that these two grounds of the certificate are couched in absolutely general terms but it is clear that the intention of the Advocate-General was not to raise mere abstract questions of law without reference to the circumstances of the case in which the view of law of the majority of the Special Bench which we are asked to reconsider was expressed and applied. I shall therefore briefly state the circumstances in which the various questions of law have arisen. So far as some of the prisoners are concerned, namely, those whom Sankaran Nair, J. alone has acquitted, the evidence of the Crown, apart from evidence relating to the general circumstances of the case, consisted principally of the testimony of three approvers, Arumugam, Somasundram and Ramaswami; and the statements which are said to have been wrongly admitted or used as corroborative evidence are statements made by these men on several occasions before trial. In dealing with the question whether the way in which the learned Chief Justice and Ayling, J. approached the consideration of the evidence of these approvers involves an error in law, one has to bear in mind the nature of the crime to which the approvers speak, the part which they themselves played in it and the circumstances in which they have come forward to give evidence for the Crown. As unanimously found by the Special Bench, Nilakantan *alias* Brahmachari (1st accused) who had been engaged for some time in journalistic work of a more or less seditious character set on foot early in April 1910 the conspiracy, the subject of the first count, for the purpose of overthrowing the British rule 'by means of a simultaneous massacre of all Europeans on a day to be subsequently fixed.' This plan which was as original as it is startling in conception was thought of, because all other methods which had been tried before by those who have been engaged in the criminal conspiracies against the Government which have come to light in recent years in some parts of India, such as preaching, writing in newspapers and isolated assassinations, had failed. Nilakantan found some co-adjutors; according to the finding of the majority of the Bench his confederates would be about twelve in number including the approvers, besides two or three more men who have not figured in the case, and in the view taken by Sankaran Nair, J. about seven. Of these, the accused Sankarakrishna Aiyar (accused No. 2), one Vanchi and the approver, Arumugam, appear to have been the most active adherents of

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Nilakantan. The evidence of conspiracy consists of the oaths taken by the conspirators at three distinct meetings—the first at a place called Tenkasi on the 10th April 1910, the second at Tuticorin in the middle of July and the third which was held at Punalur after the second meeting—to the effect that they would kill all white men on one and the same day when there was to be a general rising throughout the country and that they would sacrifice their lives and their properties in order to carry out the design. The oath was written in a piece of paper and all, who agreed to join the movement, pricked their thumbs and affixed their thumb impression in blood on the paper. The papers are not forthcoming. But according to the approvers, Nilakantan, Sankarakrishnan, Madathukadai Chidambaram Pillai (Accused Nos. 1, 2 and 3) and the approver Arumugam (6th prosecution witness) took part in the first meeting, the 1st, 2nd, 4th and 5th accused and all the three approvers took the oath at the second meeting, and the accused Nos. 1, 2, 6, 7, 8, 9 and 14, Vanchi and five other men took the oath at the third meeting which was held some time in August 1910. Nothing however, so far as it transpires in the evidence, seems to have been done to carry out the seditious design either in the shape of collecting arms or men in any other way whatsoever. Having regard to the obscure and humble position in life of the conspirators, the absolute lack of any means at their command to carry out a plan which from its magnitude, no less from its character, would be regarded by most people as one impossible of achievement, I think the majority of the Court was justified, if I may be allowed to say so, in regarding the conspiracy as something contemptible, so far as the possibility of its leading to any result is concerned. In all probability the idea would have died a natural death and would not even have been heard of except for an event which, in the language of the judgment of the majority of the Court, has little or no bearing on the charge of conspiracy. Vanchi who was an ardent follower of Nilakantan's teachings shot down Mr. Ashe, the Collector of Tinnevelly, on the 17th June 1911, and himself committed suicide on the spot. The motive of the murder was evidently political but, as pointed out in the judgments of the Special Bench, the offence was not committed in pursuance of the conspiracy with which the prisoners are charged, it was in fact an act done in direct violation of the plan decided upon at the meetings. The majority of the Bench observe 'the evidence as to the circumstances in which the murder was committed has very little, if any, bearing on the question whether the accused or any of them are guilty under Section 121 A of the Indian Penal Code.'

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Nevertheless, the conspiracy charged against the prisoners is a grave offence against the State and the legislature attaches to it the most serious penalties. The three approvers who admit having taken part in such a conspiracy were permitted to give evidence against the prisoners under pardon granted to them by the Magistrate under Section 337, Criminal Procedure Code, 'on the condition of their making a full and true disclosure of the whole of the circumstances within their knowledge relative to such offence and to every other person concerned whether as principal or abettor, in the commission thereof.' These persons, if found not to have complied with the condition of pardon, whether by wilfully concealing anything essential or by giving false evidence may be tried for the very offence in respect of which the pardon was tendered, or for any other offence of which they appear to have been guilty in connection with the same matter and the very statements made by them may be given as evidence against them when they are placed on their trial after the pardon has been forfeited. The approvers in this case are therefore men who were giving their evidence with halters round their necks, to use an expressive phrase which I believe occurs in one of the numerous cases cited at the bar on the subject of accomplice's evidence. The probability that persons in their perilous position would attempt to purchase immunity for themselves by falsely implicating innocent men is so great, that, apart from any special rule of law that may or may not exist as to the necessity of requiring corroboration of accomplice's evidence generally, it is obvious to one's common sense that the danger of acting upon such witnesses' word alone against the accused persons must be grave indeed. I would not for my part hesitate in saying that a conviction founded on evidence of this character must be wrong as being based on absolutely unsafe materials unless there are to be found in the case the amplest guarantees of its truth derived from circumstances and evidence altogether independent of these witnesses' statements.

The certificate of the Advocate-General in its first paragraph assumes that the majority of the Special Bench have in fact acted upon Arumugam's and the other approvers' evidence without any corroborative evidence; even if that were so, we should be powerless to interfere unless it was made out that in so acting or in the way they have dealt with that evidence the learned Judges have committed an error in law. It is important at the outset to know in what light they have regarded the approvers' evidence and what use they have made of it. As I read their judgment they are of opinion that this evidence from its very nature must be received

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with caution and care and that, though it was correct to say as contended for on behalf of the defence that it was not open to them in law to act upon it, yet, they would not feel themselves safe in accepting such evidence in so far as it affected the prisoners without corroboration. There are passages in the judgment of the majority of the Bench which go to show that they were prepared to believe the general truth of the approvers' story apart from any corroborative evidence, but none from which it can be reasonably inferred that they would have accepted that evidence alone as sufficient to prove the complicity of the prisoners. On the other hand, they attach the utmost importance to certain previous statements of the approvers as corroborative of their evidence in court and when they came to consider the case of the Crown against the accused persons individually they take care to state whether the corroborative evidence, such as it is, implicates or does not implicate particular prisoners. As regards the law regarding accomplices' evidence generally the majority of the Special Court lay down that the law does not prohibit the conviction of an accused person on the uncorroborated testimony of an accomplice, but that at the same time in accepting such evidence the Court must act with the greatest possible caution. These are their words. "In the case before us we are judge and jury. We have to direct ourselves. The proper direction seems to us to be—consider the evidence of the approvers, always bear in mind that it is tainted evidence, scrutinise it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then, if you believe it, act on it even if there is no corroboration in the strict sense of the word. If you do not believe it, reject it." So far as these statements go, I do not think they can, in my opinion, be said to contain an erroneous proposition of law. I may observe however that the learned Judges undoubtedly lay emphasis on that aspect of the law according to which a conviction founded upon the uncorroborated testimony of an accomplice is not illegal. But they do so apparently to meet the extreme arguments of the pleaders on behalf of the accused to the contrary and not because they were prepared in the case before them to act upon such evidence.

The *first question* raised by the certificate is stated in these words: "That in my judgment the opinion of the majority of the court that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon, and that it would be open to the court to convict on the uncorroborated testi-

mony of an accomplice if the court was satisfied that the evidence was true, requires to be further considered ; and it requires to be further considered whether Section 133 of the Indian Evidence Act read with Section 114, illustration (*b*) does not merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances." If we take the two statements independently of each other and the first part of the paragraph to mean that the majority of the Bench were wrong in stating as a general proposition that the law permits of a conviction on the uncorroborated testimony of an accomplice, then there can be no doubt that the Advocate-General's objection is untenable and for this purpose it is sufficient to refer to the clear language of Section 133 of the Indian Evidence Act. But I do not think that that is what the Advocate-General meant. Both parts of the first paragraph of the certificate must be read together and so read what the certificate really means is that the Judges' statement that the law permitted of a conviction being based on the uncorroborated evidence of an accomplice is inaccurate inasmuch as it does not add the necessary qualification that, apart from any special circumstances, the Court ought to raise the presumption spoken of in Section 114, illustration (*b*), that an accomplice is unworthy of credit unless he is corroborated in material particulars, and therefore in ordinary cases the conviction would be illegal if based on such evidence. But as I have pointed out the learned Judges were of opinion that the evidence of an accomplice should *prima faice* be regarded with distrust, otherwise there would be no meaning in their saying that you must accept such evidence with caution. The certificate in this connection apparently proceeds upon a misconception of what is laid down by the learned Judges. In this view of the matter it would have been unnecessary to go further into the first question but for the fact that in my opinion certain statements which were relied upon by the learned Judges as corroborative evidence justifying them in acting upon the evidence of the approvers as against the accused persons have been wrongly so used: and, it will thus be necessary to see whether we can hold that apart from any corroboration this is a case in which there are circumstances which might make the general rule relating to the untrustworthiness of an accomplices' evidence inapplicable. Besides, the whole question as to the proper scope of the law regarding the subject having been raised by the first ground of the certificate and elaborately discussed at the bar, it is right that one

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should state one's opinion in the matter. The literature on the subject of accomplices' evidence is very large and one with which lawyers are quite familiar. The only point that has any novelty in this case is whether this Court can interfere as a matter of law with a conviction founded upon the evidence of an accomplice in a trial held by a judge without a jury where there is no corroboration of such evidence or if the evidence which the Court has relied on as corroborative is not such as to meet the requirements of the rule, and if so, in what circumstances?

The decisions on the subject of accomplices' evidence in this country are to be found in cases tried by District and Sessions Judges with a jury or assessors or by a High Court Judge with a jury. When a trial is by a Sessions Judge with the aid of assessors, the High Court, as the Appellate Court, has plenary powers of review in order to arrive at a decision upon the evidence whether the conviction is right (see Sections 418 and 423, Criminal Procedure Code). The Sessions Jugde as a Court of appeal is given similar unlimited powers of review over convictions by Magistrates in cases triable by the latter. When there has been an appeal to the Sessions Court from a conviction of a magistrate and it has confirmed the conviction, and in certain cases of summary trial by a Magistrate in which the legislature allows no appeal, the High Court has the power of revising the case (see Sections 435 and 439, Criminal Procedure Code.) These powers are of a very wide character though the usual practice of the High Court is not to interfere in such cases except where the decision in question involves an error in law which has contributed to a miscarriage of justice. In other cases the question whether a conviction based on the uncorroborated testimony of accomplices can be regarded as erroneous in law may be of some practical importance though the fact that the High Court in any particular case did interfere in revision to set aside the conviction would not necessarily mean that it treated the question as one of law. When a case is tried by a Sessions Judge with the aid of jury the prisoner can appeal to the High Court against the verdict only on a matter of law (see Section 418, Criminal Procedure Code); if the trial was held by a Judge of the High Court in the exercise of its original criminal jurisdiction, then, as we have seen, the prisoner has no right of appeal but if the trying Judge has reserved any point of law for the decision of the High Court or the Advocate-General has certified to an error in a decision of law, the High Court is entitled to decide that point of law and pass such judgment as the case may require.

Now, whether the High Court exercises its powers as an Appellate Court under Section 417, Criminal Procedure Code, in cases tried by a jury or as a court of error under Article 26 of the Letters Patent, in either case it can interfere only when the trial is vitiated by an error in law and there is no substantial difference in the conditions of interference in the two cases. In *Queen Empress* v. *O'Hara*,[1] already referred to, a question was raised whether the words of Article 26 'an error in the decision of a point or points of law decided by the court of original criminal jurisdiction' are to be understood in a strictly literal sense as being applicable only to cases in which certain questions of law have been expressly raised and decided at the trial, and it was held that the language was wide enough to extend to cases where what is complained of involves a violation of the law or a failure to give effect to the injunctions of law. There can be no doubt in my opinion that this interpretation of Article 26 is correct and it has not been contended otherwise in the present case.

I have already said that the contention on behalf of the accused that a conviction is illegal merely because it is based on the uncorroborated testimony of an accomplice is sufficiently answered by Section 133 of the Indian Evidence Act. The law has never been otherwise either in India or in England, at least not for a very long time. On the other hand it is equally clear that the law makes special provisions as regards the treatment of an accomplice's evidence ; the reception of that evidence stands on a different footing from the evidence of other witnesses. This, because of the fact that this class of witnesses are not only men of an infamous character but are induced to give their evidence by the expectation or hope that they would not be proceeded against for the crime which they are found to have committed if their story is believed as against the prisoners. The natural tendency of men in that position is to make out a case against the prisoner in order to save themselves. Instead of trying them for the offence which they have committed, the state tenders a pardon to them in special cases with a view to obtain full information as to certain crimes which but for such evidence would not have come fully to light. But the law does not say that in such cases, because of the difficulty of detection, the court may be satisfied with a lower degree of certainty in the evidence than in other cases. On the other hand, the rule of law that the guilt of an accused person must be established beyond all reasonable doubt applies with equal

1. (1890) I. L. R. 17 C. 642.

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force in all cases, and the more serious the nature of the crime with which a person is charged, the more circumspect the court must be as to the evidence it acts upon. These indeed are truisms of the criminal law of the land; it may nevertheless be useful sometimes to state them, lest they are forgotten.

In one part of the arguments of the learned Advocate-General on behalf of the Crown, he seemed to contend, if I followed him aright, that inasmuch as the legislature by Section 133 of the Indian Evidence Act declares that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, it must necessarily follow that in no case where a conviction is based on such testimony by a tribunal of facts is such conviction liable to review by a superior authority whose powers of interference are limited to matters of law. There is an apparent fallacy in this argument which treats the declaration that 'a conviction is not illegal merely because it is based on the uncorroborated testimony of an accomplice' as equivalent to a declaration that a conviction based on such testimony must necessarily be regarded as legal. It is obvious that the one does not follow as a logical consequence from the other. Section 133 does not purport to deal exhaustively with the question as to whether convictions based on an accomplice's testimony are or are not liable to be set aside as a matter of law. For instance, suppose the law imposes on a judge certain duties as to directing the jury in the matter of an accomplice's evidence short of telling them that the law does not permit of their acting on such evidence, would that be inconsistent with anything contained in Section 133? Clearly not. Then if the judge failed to give such directions, the provisions of this section would not prevent the question of propriety of a verdict given under these circumstances being treated as a point of law. Now Section 133 must be considered along with Section 114, illustration (*b*), and the explanations to that illustration furnish an indication how consideration of the evidence of an accomplice should be approached by the tribunal which is asked to act upon it. Section 114 says, the courts 'may presume' the existence of any fact which, it thinks, likely to have happened regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case: in other words it says that the court may make certain natural presumptions. Illustration (*b*) to Section 114 is an example of such natural presumption. It says that the court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. Then the legislature goes on to state 'But

the court shall have regard to such facts as the following in considering whether such maxims do or do not apply' and cites two cases in explanation of illustration (*b*) suggesting without expressly saying so, that the maxim as to an accomplice being unworthy of credit unless he is corroborated in material particulars might not apply to those cases. Section 4 of the Indian Evidence Act lays down that wherever the phrase 'may presume a fact' is used, it means that the court may regard such fact as proved in law until it is disproved or may call for proof of it, contrary to 'shall presume' when the court shall regard the fact to be proved unless and until it is disproved. Presumptions of this class must therefore be regarded as presumptions of fact and not of law. The argument on behalf of the Crown then is that the question of drawing a presumption as to the untrustworthiness of an accomplice's evidence is left to the discretion of the court, and if the court has erred in this respect, it would not be an error in law. Even if it be granted that the law leaves it to the discretion of the trying courts whether the presumption in question should or should not be raised in a particular case, it is undoubtedly a judicial discretion and it would not be correct to say that no improper exercise of such discretion can be set right as a matter of law. To my mind it is quite clear from the nature of the cases cited in the illustration that, except in the special circumstances, examples of which are attached to the Section, the legislature requires that the court should make the natural presumptions referred to in the Section. For instance, there can be little doubt that in ordinary circumstances the presumptions mentioned in illustrations (*c* and *e*) *viz.*, that a bill of exchange accepted or endorsed was accepted or endorsed for good consideration or that judicial and official acts have been regularly performed, should be made. Some indication to this effect is also furnished by the language in which the cases where the presumption may not be raised are introduced treating them as if they were exceptions to an ordinary rule. Whenever therefore the presumption is not raised or acted upon it must appear that special circumstances existed in the case which either negatived the presumption or rebutted it. Now the first sub-illustration (*b*) of Section 114 is that of a case in which the presumption of untrustworthiness which would ordinarily arise from the moral character of an accomplice and the temptation he is under to save himself at the expense of the prisoner is negatived by the supposition that the accomplice in question is a man of high and honourable character and any likelihood of his falsely implicating an innocent man in order to save

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himself is also negatived by that fact and by the nature of the offence to which he is speaking. The case cited as the 2nd sub-illustration shows that there need not be anything in the moral character of the accomplice and the nature of the crime which he admits having committed, to negative the distrust to which his evidence would *prima facie* be subject and yet extraneous circumstances such as the fact that he and two others of his companions arrested immediately after the commission of the offence gave the same account of the occurrence implicating the accused under circumstances which for all practical purposes precluded the chances of a previous concert may be regarded as vouching for the truth of the accomplice's evidence. The supposed facts of the two illustrations are such as to leave no room for any reasonable doubt as to the truth of the accomplice's story in each case. There may of course be circumstances of a similar nature which would equally clearly negative the ordinary presumption against the reliability of an accomplice's evidence and it is the function primarily of the trying court to attach due weight to those circumstances. Further, the strength of the presumption when it arises must vary in different cases having regard to the nature of the crime, the strength of the motive that may exist to tell a false story, and other similar circumstances. All this to my mind only shows what has been declared in so many words by Section 133 that the legislature did not intend to lay down a hard and fast rule that in every case the accomplice's testimony must be regarded as unworthy of credence, if not corroborated; but it does not follow therefore, as argued on behalf of the Crown, that in no case where the court refused to raise the presumption can it be said that it has erred in law. For instance, there can be no doubt that in ordinary cases an omission to raise the presumptions mentioned in illustrations (*c*) and (*e*) would be an error in law and justify a court of second appeal in interfering with the decree of the lower courts on that ground. The presumption as to the unreliability of an accomplice's evidence is placed by the legislature on the same footing. No doubt there are cases and cases and while in doubtful cases the position contended for on behalf of the Crown may well be sound there is nothing at least in the Indian Evidence Act or in reason that in other cases in which there could be no two opinions that the presumption that an accomplice is unworthy of credit unless corroborated applies in full force not being either negatived or rebutted, an omission to raise the obvious presumption should not be treated as an error in law.

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On the other hand, as I have pointed out the illustrations to Section 114 furnish an indication to the contrary.

Now if the view which I have above indicated of the effect of the provisions of the Indian Evidence Act be correct there is no foundation whatever for the suggestion that these provisions are in any respect different from what is laid down in the rulings of the Indian Courts on the subject, either since the passing of the Indian Evidence Act or before it, or of the English Courts. Before the passing of the present Evidence Act, the question of accomplices' evidence was dealt with in India by Section 28 of Act II of 1855 in these terms, "Except in cases of treason, the direct evidence of one witness, who is entitled to full credit, shall be sufficient for proof of any fact in any such court or before any such person. But this provision shall not affect any rule or practice of any court that requires corroborative evidence in support of the testimony of an accomplice." Then it appears that at least in Bengal there was some uncertainty in the decisions of the courts on the question whether it was legal to convict upon the uncorroborated testimony of an accomplice and the matter was referred in 1866 to a Full Bench of the Bengal High Court. In that case *Elahee Buksh's* case,[1] Sir Barnes Peacock in his well-known judgment fully investigated the whole question relating to an accomplice's evidence after an elaborate survey of the English and Indian authorities, and what he then laid down has not only been since followed as the law by all the courts without question, but the Indian legislature when it came to pass the Indian Evidence Act has embodied the important principles enunciated in that judgment in Section 133 and the illustrations to Section 114 above referred to. In fact at least one of these illustrations is bodily borrowed from the judgment of Sir Barnes Peacock. It would be worse than idle on my part to refer again to the old English and Indian decisions discussed in the judgment of Sir Barnes Peacock. His conclusions are that an accomplice, being a competent witness, a conviction founded upon the uncorroborated evidence of one or more accomplices alone is valid in law. But as a general rule there is danger in acting upon the evidence of an accomplice who is admitted to give evidence for the Crown for reasons already indicated and that this danger is at least as great here as in England. The danger however disappears if the grounds which give rise to the apprehension are found to be absent in any particular case and he cites a hypothetical case which is embodied as sub-illustration to illustration (*b*) to Section 114.

1. (1866) 5 W. R. Criminal Rulings, page 80.

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He further lays down that as a general rule it would be as unsafe to act upon the evidence of more than one accomplice as of one; otherwise two companions in guilt might get off by conspiring and falsely accusing two innocent persons. To this, there may be exceptions, and then he cites a case which has apparently suggested the second sub-illustration to illustration (*b*) of Section 114. As regards the duty of the judge in dealing with such evidence, he lays down with reference to the provisions of the then Criminal Procedure Code, which in this respect are the same as Section 279 of the present Code, imposing upon the judge the duty of summing up the evidence, and, also upon general principles relating to trials by jury as are to be gathered from the decisions and practice of English judges, that it is quite as necessary here, as in England, if not more so, that the evidence of accomplices should not be left to a jury without such directions and observations from the judge as the circumstances of the case may require, that the giving of improper advice by the judge or omission by him to give that advice, which the Judge in the exercise of a sound judicial discretion ought to give upon questions of fact or as to the degree of credit to be given to particular witnesses, is an error in law in the summing up. He then gives as an example an omission on the part of the judge to tell the jury that the accomplices were giving the evidence under a tender of pardon or to explain to them the position in which the witnesses were placed and the danger of acting upon the evidence unless they should find that it was corroborated. He goes even further and says that it is the duty of a judge to advise the jury not to believe the evidence of an accomplice unless he is confirmed and only so far as he is confirmed and a failure in that respect is an error in law and forms a good ground of appeal against a conviction founded on a verdict of guilty based upon such evidence alone. He also holds that it would be an error in the summing up to tell the jury that the evidence of the accomplices was corroborated by evidence of a fact which did not amount to any corroboration at all. He finally lays down that, where there is an error in the summing up of the evidence, that would warrant the court in setting aside the verdict of guilty, if the court is satisfied that the prisoner was prejudiced by the error and that there has been a failure of justice. But the verdict and conviction ought not to be set aside, if the court be of opinion that it was warranted by the evidence, and upon the evidence, they would have upheld the conviction on appeal, if the trial had been by the judge with the aid of assessors instead of by a jury.

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In this Presidency the ruling in Proceedings, dated 20th March 1868, reported in 4 M.H.C.R., Appendix, page VII, which was before the passing of the Indian Evidence Act of 1872, lays down that no rule of law prohibits a conviction upon the uncorroborated testimony of an accomplice but as a general rule of practice it is unsafe to convict upon such evidence and it is the duty of a judge to point out the circumstances if any which would justify the jury to rely upon such evidence. In *Queen* v. *Nawab Jan and others*,[1] Kemp and Macpherson, JJ. set aside a verdict on the ground that the judge did not with sufficient emphasis caution the jury as to the danger of paying any respect to the testimony of the approver in the case, and wholly omitted to guide them as to what amounted to legal corroboration in some material circumstances, such circumstances, connecting and indentifying the prisoner with the offence. In *Queen* v. *Nidheeram Bagdee and others*,[2] Couch, C.J. and Bayley, J., on the other hand upheld a verdict of a jury since the judge had properly cautioned them on the point and as the jury still found a verdict of guilty, there was no error in law. It is significant to note that the learned Judges thought that it was a proper case in which an appeal might be made to the Government. In *Queen* v. *Nunhoo and 4 others*,[3] Kemp and Jackson, JJ. laid down that the evidence of an accomplice may be of itself evidence, but it should never be admitted as sufficient proof of guilt unless it is corroborated. In Bombay also in a case, *Reg*. v. *Fatechand Vasta'chand*,[4] it was laid down that it was the duty of the judge to follow the ordinary rule and not to act upon the accomplices' evidence without corroboration in a material part of it.

The first reported case of importance decided after the coming into operation of the present Indian Evidence Act is that of *Queen* v. *Sadhu Mundul*,[5] which was heard by Phear and Morris, JJ. on appeal from a conviction on a charge of murder in a trial by a jury. The learned judges considered the effect of the enactment and their conclusion was that Section 114, illustration (*b*), contained a legislative declaration that, regard being had to the common course of natural events and human conduct, an accomplice is unworthy of credit so far as his testimony implicating another person is concerned, unless he is corroborated in material particulars in respect of the prisoner, but that in exceptional cases, such as those mentioned in the sub-illustrations, the court might give credit to the accomplices' testimony against the accused, if it sees good reasons

1. (1867) 8 W. R. Crl. R. p. 19. 2. (1872) 18 W. R. Crl. R. p. 45.
3. (1868) 9 W. R. Crl. R. p. 28. 4. (1868) 5 Bom. H. C. R., C. C. p. 85.
5. (1874) 21 W. R. Criminal Rulings, page 69.

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for doing so upon grounds other than the personal corroboration. They go on further to observe that it is the nature of an accomplice's evidence that calls for corroboration even though such evidence was given in a process of careful examination or capable of being tested by cross-examination.

The earliest decision of this Court under the Indian Evidence Act brought to our notice is in *Reg* v. *Ramasami Padayachi*,[1] where Morgan, C. J. and Kindersley, J. laid down that it was not the law that the evidence of an accomplice was irreceivable in evidence without corroboration and that Sections 133 and 114, illustration (*b*), coincide with the rule in England. They state the rule to be that the tainted evidence of an accomplice should be carefully scanned and received with caution and may be treated as unworthy of credit, yet if the jury or the court, as the case may be, credits the evidence, a conviction proceeding upon it is not illegal. Some reliance was placed on this ruling on behalf of the Crown, as if it laid down the law differently from the other decisions, but I find nothing to support the suggestion. The judgment does not deal with the question in what cases the manner in which an accomplice's evidence is dealt with by the court, either in directions to the jury or in laying down for its own guidance the principles for testing such evidence, may amount to an error in law. On the other hand they say that the law on this point is the same as the law in England on the point. In *Reg.* v. *Malapabin Kapana and others*,[2] Nanabhai Haridas and Larpent, JJ. in considering the question whether certain evidence can be considered corroborative evidence in the sense in which judges require corroboration of an accomplice's statement within the meaning of Section 114, illustration (*b*), they take it for granted that the rule is to require such corroboration.

As for the more recent decisions of this Presidency, Collins, C. J. and Muthuswami Aiyar, J. in *Queen Empress* v. *Arumuga*,[3] laid down that a judge should caution the jury not to accept the evidence of an approver unless it is corroborated and the omission to do so would amount to a misdirection. In *King Emperor* v. *Mohiuddin Sahib*,[4] Davies and Moore, JJ. held that the evidence of an accomplice ought to be corroborated in some material circumstances and in *Emperor* v. *Edward William Smither*,[5] Davies and Benson, JJ. state that an accurate statement of the law on the subject will be to say that as a general rule it is unsafe to act upon

1. (1878) I. L. R. I. M. 394. 2. (1874) 11 Bom. H. C. R. 196.
3. (1888) I. R R. 12 M. 196. 4. (1901) I. L. R. 25 M. 143.
5. (1902) I. L. R. 26 M. 14.

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the uncorroborated testimony of an accomplice but there may be especial circumstances in which it would not be unsafe to act upon such evidence. In *Ramasami Gounden* v. *Emperor*,[1] Subramania Aiyar, J. said that the Indian Law in this matter was borrowed from the English Law as held in *Queen* v. *Elahee Buksh*,[2] the judge ought not to direct the jury to acquit if the case against the prisoner rested mainly upon the uncorroborated evidence of an accomplice, but it was sufficient if the judge advised the jury not to convict upon such evidence as stated in *Reg.* v. *Boyes*[3]. Boddam, J., however would go further holding that it would be the duty of the judge in such a case to direct the jury to acquit. The matter on being referred to Bashyam Aiyangar, J., he agreed with Subramania Aiyar, J. as to the proper scope of the law on the subject and pointed out that it was the duty of the judge to explain to the jury that it was not safe to convict upon the uncorroborated evidence of an accomplice and if there was no corroboration of the accomplice in a material particular to draw their attention to the fact. The Judge ought also to add, he says, that a conviction upon such testimony is perfectly legal, and if a jury bearing in mind the caution still believed the evidence it would be their duty to convict. The learned Judge observes that the practice not to convict upon the evidence of an accomplice unless there is corroboration has been so hallowed by time as to be deserving of respect and that in fact the rule of law as laid down by Section 133 of the Indian Evidence Act is practically rendered nugatory by the rule of practice. In *Queen-Empress* v. *Kunjan Menon and Sankunni*,[4] a Full Bench of this Court consisting of Collins, C. J., Kernan, Muthuswami Aiyar, Parker, and Wilkinson, JJ. observe that it has now become a general rule of practice that the judge ought to advise the jury to acquit unless the evidence of the accomplice is corroborated; and in a case, *In re Kuppan*,[5] Benson and Miller, JJ. stated that it was a general rule of practice that it was not safe to convict upon the uncorroborated evidence of an accomplice. The recent rulings of the other High Courts are to the same effect. Birdwood and Jardine, JJ. in *Queen Empress* v. *Krishna Bhat*,[6] say that Section 114, illustration (*b*), lays down the ordinary rule that an accomplice is unworthy of credit unless he is corroborated in material particulars and that it was an established rule of practice that the accomplices must be corroborated by independent evidence as to the identity of every person he impeaches. Jardine and

1. (1903) I. L. R. 27 M. 271.
2. (1866) 5 W. R. Cre. R. 80.
3. (1861) 9 Cox's Crl. Cases 32.
4. (1891) 1 M. L. J. 397.
5. (1909) 5 M. L. T. P. 355.
6. (1885) I. L. R. 10 B. 319.

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Bayley, JJ. in *Queen-Empress* v. *Maganlal*,[1] also enunciate the law to the same effect saying that it is the established practice to require corroboration of an accomplice's evidence and it is for those who want such evidence to be acted upon to allege reasons why the ordinary test of the evidence of accomplices should not be applied in a particular case. In *King-Emperor* v. *Malhar*,[2] Fulton and Crowe, JJ. while admitting the existence of the general rule, point out that all persons coming within the category of accomplices cannot be treated as on precisely the same footing. In *King-Emperor* v. *Shrinivasa*,[3] Jenkins, C. J. and Russel, J. point out that the absolute rule of law on the subject of accomplices' testimony is contained in Section 133 of the Indian Evidence Act, there is further a rule of guidance which is embodied in Section 114, illustration (*b*), and that it would be an error of law to disregard the presumption indicated in the latter rule. In Calcutta, Rampini and Pratt, JJ. in *Queen-Empress* v *Deodhar Singh*,[4] point out that the presumption stated in illustration (*b*) to Section 114 has become a rule of practice of almost universal application and in *Kamala Prasad* v. *Sital Prasad*,[5] Amir Ali and Pratt, JJ. observe that ordinarily speaking the evidence of an accomplice should be corroborated in material particulars and the practice, which has been laid down, has become, one may say, a part of the law itself. In *Jamiruddi Masalli* v. *Emperor*,[6] Prinsep and Stephen, JJ. observed that the Sessions Judge ought to have told the jury that though the law permits of a conviction being based upon the uncorroborated evidence of an accomplice, yet it was not the practice of our courts to convict on such evidence. It was a misdirection to tell a jury that the evidence of the accomplice was corroborated by a fact which did not amount to any corroboration at all. In *Deo Nandan Pershad* v. *Emperor*,[7] Brett and Stephen, JJ. recognise the rule of practice which lays down that it is generally wrong to convict upon the uncorroborated evidence of an accomplice but they agree with the proposition stated in *King-Emperor* v. *Malhar*,[8] that the rule does not apply in equal force to all persons coming technically within the category. In a recent important trial under the Criminal Law Amendment Act, 1908, for an offence under Section 121 A of the Indian Penal Code in the Calcutta High Court (*King-Emperor* v. *Lalit Mohan Chuckerbutty and*

1. (1889) I. L. R. 14 B. 115.
2. (1901) I. L. R. 26 B. 193.
3. (1905) 7 Bom. L. R. 969.
4. (1899) I. L. R. 27 C. 144.
5. (1901) I. L. R. 28 C. 337.
6. (1902) I. L. R. 29 C. 782.
7. (1906) I. L. R. 33 C. 649.
8. (1901) I. L. R. 26 B. 193.

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others,[1] it was conceded before the Special Bench as a proposition which was not open to question that before the approver's testimony could be acted on it must be corroborated in material particulars, that the nature and extent of this corroboration was well settled, there must be corroboration not only as to the crime but also as to the identity of each one of the accused. The learned Judges observe that this is no technical rule but founded on long judicial experience.

In the Allahabad High Court, the law was fully considered by Straight and Tyrell, JJ. in *Queen-Empress* v. *Rama Saran,*[2] and they held that the law in India as contained in the Indian Evidence Act is the same as in England *viz.*, that, though a conviction is not illegal, that is, not unlawful if it is based on accomplice's testimony alone, experience teaches us that it is not safe to rely upon such evidence unless it is corroborated, and it is the practice of judges both in England and in India when sitting alone to guard their minds carefully against the evidence of approvers. The corroboration, they observe, must extend to the identity of the accused persons. Straight, J. also points out that the tendency of late years in England is to apply the rule with great strictness, and, as I shall show, the practice of the Court of Criminal Appeal is to set aside a verdict of guilty if the judge did not advise the jury not to act upon the testimony of an accomplice. In *Queen-Empress* v. *Gobardhan,*[3] Edge, C. J. says that as a general rule it would be unsafe to convict an accused person on the uncorroborated evidence of an accomplice and a judge should advise the jury to that effect. It is at the same time not only open to the jury but it is their duty if they believe such evidence in spite of the caution to bring in a verdict of guilty. In *Abdul Karim* v. *King-Emperor,*[4] Banerji, J. observes that the evidence of an accomplice cannot be acted upon without corroboration in material particulars, unless it is such that the court can unhesitatingly believe it.

I wish to allude very briefly to the rulings in some English cases decided after the date of the judgment of Sir Barnes Peacock in *Elahee Buksh's* case as the English decisions prior to that judgment are exhaustively dealt with there. In *Reg* v. *Cramp,*[5] Denman, J. observes that there is no doubt that the evidence of an accomplice requires corroboration. In *Reg* v. *Gallegher and others,*[6] the Lord Chief Justice Coleridge in his direction to the jury observed 'if the jury upon the evidence of the approver him-

1. (1910) I. L. R. 38 C. 559.
2. (1885) I. L. R. 8 A. 306.
3. (1887) I. L. R. 9 A. 528.
4. (1904) 1 A. L. J. 110.
5. (1880) 14 Cox. C. C. 390.
6. (1883) 15 Cox. C. C. 291.

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self was perfectly satisfied that he was speaking the truth there was no reason in point of law why on his evidence they should not act and find the accused guilty, but the danger of acting upon the uncorroborated statement of an approver was obvious and the wisdom of requiring that some corroborative evidence should be given before such statements are acted upon was perfectly apparent to any intelligent mind. The law was as he had stated and the practice was always to require corroboration.' In *In re Meunier*,[1] where the question was whether the evidence of an accomplice if uncorroborated was sufficient to justify a committal for surrender to France, Cave, J. held that it was not the law that a prisoner must be acquitted in the absence of corroborative evidence and there was no power in the court to withdraw a case from the jury on that ground. In *Rex* v. *Tate*[2] Lord Alverstone delivering the judgment of the Court of Criminal Appeal while pointing out that there was no definite rule of law that a person cannot be convicted upon the uncorroborated evidence of an accomplice as stated by Cave, J. in *In re Meunier*, observed that he ought to have added 'assuming that the jury was cautioned in accordance with the ordinary practice,' and then cites the following passage from Taylor on Evidence, X Edition, page 688, as containing a correct exposition of the law. "Judges...in their discretion, generally advise a Jury not to convict a prisoner upon the testimony of an accomplice alone: and although the adoption of this practice will not be enforced by a court of review, its omission will, in most cases, be deemed a neglect of duty on the part of a judge. Considering too the respect which is always paid by the jury to such advice from the bench, it may be regarded as the settled course of practice not to convict a prisoner, excepting under very special circumstances." He also cites with approval a passage from Russel on Crimes, 6th Edition, Volume III, page 646. "It may be observed that the practice in question has obtained so much sanction from legal authority, that it 'deserves all the reverence of law,' and a deviation from it in any particular case would be justly considered of questionable propriety."

In *Rex* v. *Everest*,[3] the Court of Criminal Appeal (Darling, Bray and Lawrence, JJ.) laid down that a judge should direct a jury to acquit if the evidence against the accused is that of a person put forward as an accomplice and his evidence is not corroborated in some material particular, that is to say, in some particular that involves the guilt of the accused. In *Rex* v. *John Warren*,[4] the

1. (1894) 2 B. 415.
2. (1908) 2 K. B. 680.
3. (1907) 73 J. P. 269 at p. 271.
4. (1907) 73 J. P. 359.

Court of Criminal Appeal quashed a conviction on the ground that there was very little, if any, evidence of corroboration proper to go to the jury and that the judge did not adequately direct the jury that they should acquit the appellant if the accomplice's story was not corroborated in some material particular, that is, in some particular that involved the guilt of the accused. Channell, J. observed in his judgment that 'The rule was very clear now about the evidence of an accomplice.—It must be corroborated in some material particular.' It seems to me that in the last two cases the words 'directing the jury to acquit' should perhaps be understood in the sense of advising the jury to that effect and not in the sense of withdrawing the case from the jury.

It should be pointed out with reference to the judgments of the Court of Criminal Appeal in England that though under 7 Edw. VII, Cap. 23, Section 3, the prisoner is given an appeal as of right only on a question of law, the appellate court has the power in certain circumstances to review the verdict and conviction on a question of fact or of mixed law and fact. But they seem to lay down generally that it is the duty of the judge to advise the jury not to convict upon the uncorroborated testimony of an accomplice and a failure to discharge that duty would *ipso facto* make the conviction liable to be set aside. The power of this Court to interfere under Article 26 of the Madras Letters Patent is however confined to matters of law and in this respect it is analogous to the power which the Queen's Bench as a court of error has under 11 and 12 Vict, Cap. 78. On the question therefore what would amount to an error in law in dealing with the evidence of an accomplice the decision of the Court of Crown Cases Reserved in *Queen* v. *Stubbs*,[1] is much relied on by the Council for the Crown. But all that is said there is that it is not a rule of law that an accomplice must be corroborated in material particulars but is only a rule of practice and a question of practice cannot be reserved for the opinion of that court. In that case, the judge had in fact cautioned the jury as to the case of Stubbs where there was no corroboration and what the Court of Crown Cases Reserved held was that his failure to advise the jury not to convict was an omission to observe a rule merely of practice. It is clear however that the tendency of the more recent English decisions is to invest the practice with the stringency of law: that in India also, an omission to advice the jury in accordance with the practice would be an error in law is the view of Sir Barnes

1. (1855) 25 L. J. M. C. 16.

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Peacock and many other judges as is apparent from the decisions I have referred to.

My conclusion is that it is well established law that except, in circumstances of an especial nature, it is the duty of the court to raise the presumption that accomplices' evidence is unworthy of credit as against the accused persons unless it is corroborated in material particulars and the failure of the judge to direct the jury to that effect is an error in law. It will none the less in my opinion be an error in law if the trial was held without a jury and the Judge or the Magistrate misdirected himself on this point and treated an accomplice's evidence like that of any other witness. I do not perceive any principle on which the two cases may be distinguished. The next proposition which is also well recognised is that. If, there are any especial circumstances which would justify a disregard of this rule, those circumstances in a trial by a jury must be clearly set out in the directions of the judge, and the appellate court is entitled to consider as a matter of law whether those circumstances are such as to justify the exceptional treatment. If, in the opinion of the appellate court, the facts in this connection are that they in no sense negative the danger of acting upon the uncorroborated testimony of the accomplice but the judge told the jury otherwise, the verdict must be set aside as being due to an error in law: if the especial facts, however, are such as may reasonably be considered to take the case out of the rule even though it is possible to hold a different view, the verdict cannot be interfered with by a court of error. A similar rule would hold good in cases tried by a judge alone. This is substantially how I stated the law recently in *Vyasa Rao* v.*Emperor*.[1]

As regards the nature of corroboration, the law is that corroboration must relate not only to the crime but also to the identity of the prisoner. The question whether it can be said as a matter of law that the view of the trying judge as to whether certain evidence does or does not amount to corroboration within the meaning of the rule is also governed by the same principle as I have just indicated. But the evidence given in court by an accomplice cannot be used to corroborate the evidence of another accomplice, though in exceptional circumstances (such as the second sub-illustration to illustration (*b*) to Section 114 of the Indian Evidence Act) the fact that the accounts given of the crime by different accomplices may be taken as corroboration of the evidence in court. On the other hand if the contention of the counsel for the Crown were well

1. (1911) M. W. N. Vol. 1, page 327.

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founded that, since the question whether the evidence of an accomplice is to be deemed to be untrustworthy unless it is corroborated in material particulars cannot be determined without referring to the facts of the particular case in which the evidence is given, therefore in no case, where a judge of facts has acted upon such evidence, can it be said that in failing to raise such a presumption he has erred in law, however grossly palpable the facts may be which show the danger of acting upon such evidence alone, then all that has been said hitherto by learned judges in England and India on the subject of accomplices' evidence would have no meaning whatever. For it would logically follow from such an argument that the law imposes no especial duty on the court in dealing with accomplices' evidence and the general rule that an accomplice's evidence should not be acted upon unless it is corroborated, the soundness of which, as Lord Chief Justice Coleridge puts it, is obvious to any intelligent mind, would lose all significance in law, if its disregard in any case cannot be set right as a matter of law, because in some cases of rare occurrence the rule may not be applicable.

This brings me to the *second question* propounded in the certificate. It is in these words :—

'That the opinion of the majority of the Court that the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial should be further considered.'

The answer to be deduced from the above discussion of the law is that as a general rule the previous statements of an accomplice do not legally amount to such corroboration as is required to rebut the presumption as to the unreliability of an accomplice's evidence, but there may be cases in which the circumstances in which the previous statement was made by precluding the possibility of the accused having been falsely named therein by the approver would lend corroborate force to the accomplice's evidence. The only direct decision on the point is a case, *Reg* v. *Malapa Bin Kapan and others*,[1] where the rule is stated in unqualified terms and in *Vyasa Rao* v. *Emperor*,[2] in which the question arose before Ayling, J. and myself whether evidence of a co-accomplice was sufficient corroboration within the meaning of the law, I expressed my agreement with what is laid down in the Bombay case. While I still adopt generally to what is laid down in *Reg* v. *Malapa Bin Kapana and others*, it seems to me on further consideration that, to be quite

1. (1874) 11 Bom. H. C. R. 196. 2. (1911) M. W. N., Vol. 1, page 327.

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accurate, the rule must be stated subject to the qualification, which I have suggested, and I may point out that neither the learned Judges of the Bombay High Court nor I were called upon in the cases mentioned above to consider whether the rule was subject to any qualification. Having regard to the fact that the previous statement of an accomplice is admissible in evidence, as is assumed in the second ground of the certificate, and to the nature of the cases cited by the legislature, which shows that corroboration may be furnished by previous statements of accomplices made in certain circumstances, it would be difficult to hold that the rule does not admit of exceptions. The previous statements mainly relied on by the majority of the Special Bench are those made by the approvers, Arumugam and Somasundaram respectively to the police, the first, two days, and the second, three days, after the murder of Mr. Ashe and also to some extent on the statements made by them a few days afterwards to Mr. Cox, who made a local enquiry in the case. As regards the statements to the police officer, I am of opinion that they were wrongly admitted in evidence on the ground next mentioned in the certificate and it would not therefore be necessary to consider how far, if admissible, they could be taken as amounting to corroboration of the approver's evidence in court. As regards the statements made to Mr. Cox no objection can be taken to their admissibility but so far as at present advised I fail to see how it can be held to afford corroborative evidence within the meaning of the rule. They were made long after the last meeting at which the criminal oath was taken and several days after the approvers had been in the hands of the police in connection with the murder of Mr. Ashe. The learned judges who formed the majority of the Special Court do not find that these approvers did not make the statements to Mr. Cox in the hope of being pardoned, nor do they say that the circumstances in which the statements were made precluded the possibility of their acting in concert. On the other hand it is found by Mr. Justice Sankaran Nair that the evidence points to the probability of their so acting. No doubt the learned Chief Justice and Mr. Justice Ayling say that some of the accused allege that they were strangers to Arumugam and Somasundaram and therefore their names could not have been mentioned by the approvers unless they participated in the conspiracy. That allegation has been found by the learned Judges to be untrue, but they do not find that in fact these accused came to be known to the approvers only by reason of their being members of the criminal conspiracy: on the other hand it is found in their judgment that there was an association called the Bharata Matha Association which according

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to them though of a seditious tendency was not actually a criminal association and some of the accused at least were members of that association. The fact that the Police could not have concocted the earlier or the later statements of the approvers does not meet the difficulty. I am not prepared to hold upon the facts so far as they appear in the judgment of the Special Bench that the statements to Mr. Cox would be such corroborative evidence as to minimise the danger of acting upon the testimony of the approvers. I may also observe that most of the considerations which I have indicated as applicable to the statements made to the Magistrate are also applicable to those made to the Police Officer four days previously.

The objection taken in the *third ground* to the admissibility of the statements made by two of the approvers to the Inspector of the Criminal Investigation Department is, in my opinion, well founded. Those statements are admitted under Section 157 of the Indian Evidence Act, not on the ground that they were made at the time when the fact of seditious conspiracy to which they relate took place, for the last act in connection with the seditious conspiracy spoken to by the approvers had taken place months before the making of the statements, but on the ground that they were made to an ' authority competent to investigate the fact.' The statements were made in the course of an investigation in the case of the murder of Mr. Ashe. It is moreover the finding of the Special Bench that the murder of Mr. Ashe was not in pursuance of the criminal conspiracy, the subject of the present trial, and the one had no real connection with the other. Now supposing that the officer of the Criminal Investigation Department—P. W. 31—had authority to inquire into the murder of Mr. Ashe he would have no authority to investigate the fact of a conspiracy dealt with under Section 121 A of the Indian Penal Code which is a non-cognizable offence, without a Magistrate's warrant (see Section 155, Criminal Procedure Code). Neither P. W. 31 nor Mr. Thomas had any such warrant. Section 157 of the Indian Evidence Act says that the authority must be competent to investigate *the* fact, *i. e.*, the fact, to which the statement relates. Here the fact is the conspiracy and this fact, the officers concerned in the case, had no authority to investigate at the time the statements were made. But it is said that the statements were made in the course of an investigation of an offence which was within the competency of the Police Officers. I do not however see how that makes the language of Section 157 applicable. One would not in my opinion be justified in construing Section 157 in a loose general sense

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having regard to the fact that it permits a statement, made in the absence of a party to a proceeding which he had no means of testing, to be used in evidence against him. Such departure from the ordinary rule relating to judicial evidence must be confined within the strictest limits. I may mention that it was argued by the pleaders for the accused that the word 'investigate' in Section 157 in the Indian Evidence Act is used in the technical sense of the Criminal Procedure Code. But this is clearly not so. The application of that Section of the Indian Evidence Act is not confined to criminal cases and the word 'investigate' is obviously used in its natural and popular meaning.

It is further urged in support of the third ground that Veeraraghava Iyar, P. W. 31, was not even competent to investigate the murder of Mr. Ashe. The question is dealt with in the judgment of the majority of the Special Bench at page 10, and by Mr. Justice Sankaran Nair at page 66. The question is not free from difficulty, but after careful consideration of it, I am inclined to think that the weight of reasoning is decidedly in favour of the view taken by Mr. Justice Sankaran Nair. There is nothing indeed that I can usefully add to his arguments based on the provisions of the Criminal Procedure Code on which the decision of the question depends. I may observe that Section 21 of the Police Act XXIV of 1859 throws no light inasmuch as the Sections of that Act which defined the power of a police officer have been replaced by the provisions of the Criminal Procedure Code. Nor does the confidential Government Order (G. O. No. 913, Judicial, dated 2nd July 1908) adduced in evidence on behalf of the Crown make out that an Inspector of the Criminal Investigation Department is vested with the powers of investigation under the Code. The department was created to assist the ordinary police force in the detection of certain crimes and neither that fact nor the fact that a member of the Criminal Investigation Department holds the rank of an Inspector would by itself entitle him to exercise the same powers within the Presidency of Madras as an officer in charge of a police station has within the local limits of his station under Section 156, Criminal Procedure Code.

The *fourth question* raised by the certificate is whether previous statements of the two approvers, Arumugam and Somasundram, are not inadmissible in evidence against the accused persons by virtue of Section 25 of the Indian Evidence Act. That section runs thus:—"No confession made to a Police Officer shall be proved as against a person accused of any offence." I agree with the contention of Mr. Govindaraghava Aiyar that the words

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" a person" there, mean " any person" but the real point in connection with the applicability of the Section to the statements of the approvers is, what is the meaning in which the word ' confession' is used in that Section? It could not have been used in the wide and popular sense in which it is used in every day conversation as meaning an acknowledgment of some fault, for that would make the section ridiculous, and there can be little doubt that it is to be understood in the technical sense of the criminal law. This is apparent from the fact that the word is used in connection with criminal inquiries and trials in all the sections in which it occurs namely Sections 24 to 30. What then is that meaning? It is suggested that ' confession' in criminal law means an admission of certain facts which constitute an offence or lead to an inference of guilt. Yes, but admission by whom? When the word is used in the technical sense of the criminal law, does it not always mean such an admission as above referred to when made by a person who is charged with the offence which is the subject matter of the statement? That is at least how I have always understood the word. One does not talk of the confession of a witness except in a popular sense. If the word as used in Section 25 be understood without reference to the question whether the person making it was ever tried or not for the offence to which he confesses, then it would follow that any statement by a witness to police officer which leads to an inference of guilt under the general provisions of any Act however unconnected with the offence under inquiry would be inadmissible by reason of this section. Suppose A who does not possess the necessary license sent his servant with a quantity of opium for sale and the servant returning after having sold the opium is robbed of the money, could it be said that in a trial of persons charged with the robbery the statement of the master made to a police officer immediately after the occurrence that he had sent the servant to sell opium could not be received in evidence under Section 157 of the Indian Evidence Act, because the witness' statement would amount to a confession of an offence under the Excise Act? I think not. There could be no good reason for excluding such statement on the mere ground that it was made to the police officer. The fact is, whether a statement is to be called a confession or not, depends not merely upon the nature of the statement itself, but also on the use that it is sought to be made of it. Whenever the evidentiary value of a statement as against the person making it is in question, it is then that it would be properly called an admission or confession according as the proceeding in which the question arises is of a civil or criminal nature, but not when it is intended to

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be used as evidence against a third person. For it cannot be disputed that an admission or confession means a statement amounting to an acknowledgment of certain legal liability or of facts which give raise to such liability against the person making the acknowledgment; then how can such statement be called either admission or confession in a case where the only question for consideration is; how far the liability of a third person and not of the person making the statement, is established thereby. Much stress is laid on the fact that in section 25 confession is not expressly mentioned as of an accused person while it is so used in Section 24 but if the word has a well-known meaning in the criminal law, as I think it has, then his argument has no force. I am fortified in the interpretation I have put on the word 'confession' in Section 25 of the Indian Evidence Act by the definition of 'confession' given in Stephen's Digest Article 131, which was adopted by Mahmood, J. in *Queen Empress* v. *Babu Lal.*[1] On this point, therefore, I agree with the majority of the Full Bench.

The *last ground* of the certificate is that Section 162 of the Criminal Procedure Code, which lays down "No statement made by any person to a police officer in the course of an investigation under this chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence," forbids not only the use of the writing as evidence of the statement, but of the statement itself even if it is sought to be proved without the writing. But the contention is hopeless in face of the language of the legislature. Supposing the statements made by the approvers were admissible under Section 157 of the Indian Evidence Act could it be said that Section 162 of the Code of Criminal Procedure stands in the way? According to the ordinary rule of interpretation the two enactments must be reconciled with each other if possible and if we confine the declaration of the legislature in Section 162 of the Criminal Procedure Code to what is expressed there, it may well stand with Section 157 of the Indian Evidence Act. I therefore agree with the view of the Special Bench on this point which is also the view taken by Maclean, C. J. and Carnduff, J. in *Fanindra Nath Bannerjee* v. *Emperor,*[2] Karamat Hussain, J. in *Rustom* v. *King-Emperor.*[3]

The result of what I have said is that those prisoners, in my opinion, must be acquitted and discharged whose convictions rest

1. (1884) I. L. R. 6 A. 509 at p. 539. 2. (1908) I. L. R. 36 C. 281.
3. (1910) 7 A. L. J. 468.

on the testimony of the approvers without any corroboration, independently of the previous statements of these witnesses made to the police officer Veeraraghava Aiyar or to Mr. Cox, unless the learned counsel for the Crown wishes to argue that there are facts and circumstances not mentioned in the judgment of the majority of the Special Bench, which, by themselves or if considered along those noticed in the judgment of the Bench, take the case out of the general rule that an accomplice must be deemed unworthy of credit unless he is corroborated in material particulars, or that there is evidence apart from that, relied on by the majority of the Special Court, which furnishes the necessary corroboration within the meaning of the rule as I have stated it. In that event, the case must be argued further, for, under Section 26 of the Letters Patent as I read it, a sentence is not to be set aside simply because there is an error of law involved in the direction of the judge to the jury or in the judgment of a judge sitting without a jury, if such error has not occasioned a miscarriage of justice.

Sundara Aiyar, J :—*Preliminary Objection* :—With regard to the preliminary objection that the Advocate-General had no power in this case to make a certificate under Clause 26 of the Letters Patent, there can, in my opinion be no doubt that it is unsustainable. The conviction of the accused was under the Criminal Law Amendment Act, XIV of 1908. That statute entitles the Governor-General in Council or the Local Government to direct theat the special procedure prescribed therein should apply to the proceedings in respect of any offence of which a Magistrate has taken cognizance. According to the special procedure enacted by the Act, a Magistrate who arrives at the finding that the evidence adduced before him is sufficient to put the accused upon his trial for an offence specified in the schedule to the Act should commit him for trial to the High Court. Section 11 of the Act provides that " all persons sent for trial to the High Court under the Act shall be tried by a Special Bench of the Court composed of three Judges." Section 14 lays down that " The provisions of the Code of Criminal Procedure, 1898, shall not apply to proceedings taken under this part, in so far as they are inconsistent with the special procedure prescribed in this part."

Mr. Napier contends that cases under the Act must be governed only by the special procedure laid down therein and that there is no provision in it for any review by this court, either upon any reservation of a point or points of law by the Bench trying the case, or on a certificate by the Advocate-General that in his judg-

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ment there is an error in the decision of a point or points of law decided by the Special Bench, or that the point or points of law which has or have been decided by it should be further considered. But it is quite clear that Act XIV of 1908 does not purport to lay down any complete rule of procedure and that the ordinary criminal procedure is applicable to proceedings under the Act, except so far as it, is inconsistent with the special procedure prescribed in the Act. Obviously, certification by the Advocate-General under Clause 26 of the Letters Patent is not inconsistent with the special procedure prescribed in XIV of 1908.

Mr. Napier next contends that the Advocate-General's jurisdiction to make a certificate extends only to cases coming within the purview of Clauses 23 and 24 of the Letters Patent and that these clauses do not include a case of conviction on a committal to the High Court under Act XIV of 1908 by a mofussil Magistrate, of persons beyond ordinary original jurisdiction of the High Court. I shall presently examine whether Clauses 23 and 24 would include such a case or not. But it is clear to my mind that, assuming they would not, Clause 26 is wide enough to cover the case. This clause gives power to the High Court to review (on the Advocate-General's certificate) in every case mentioned in Clause 25. The latter clause refers to "any criminal trial before the courts of original criminal jurisdiction which may be constituted by one or more judges of the said High Court." There is no reference in the clause to Clauses 23 and 24 and there is nothing in the words limiting its operation to the cases comprised in clauses 23 and 24. There can be no doubt that a trial under Act XIV of 1908 is a trial before 'a court of original criminal jurisdiction' 'constituted by one or more judges of the said High Court.' The committal under Act XIV of 1908 is to *the High Court as such* and a court of three judges of the High Court is constituted for the trial by the Chief Justice of the High Court, acting under Section 14 of the High Court's Act, 24 and 25 Vict., Cap. 104. The fact that Act XIV of 1908 was passed long after the Letters Patent is no reason for holding that Clauses 25 and 26 do not apply to a trial before a court of original Criminal Jurisdiction constituted by judges of the High Court under that Act. They are clearly applicable to all original criminal trials by the High Court, whether under an Act existing at the time of the Letters Patent or an Act passed subsequently. Clause 23 refers to the trial of persons within the local limits of the High Court's ordinary civil jurisdiction, and of other persons beyond its limits over whom the High Conrt had criminal jurisdiction at the date of the publication of the Letters Patent. Clause 24 ordains

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that the High Court "shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any court now subject to the superintendence of the said High Court and shall have authority to try at its discretion any such persons brought before it on charges preferred by the Advocate-General or by any Magistrate or other officer specially empowered by the Government in that behalf." It is admitted by Mr. Napier that the power in this section will extend to cases where Magistrate or other special officer referred to therein prefers charges under authority which they possess under any law, whether existing at the time of the Letters Patent or coming into existence subsequently. There is no reason for not placing a similar construction on Clauses 25 and 26. This would be a sufficient ground for holding that the preliminary point must fail.

I am, however, also of opinion that is not shown that Clauses 23 and 24 would not cover this case. Clause 24, as already mentioned, gives power to the High Court to try any person brought before it on charges preferred by any Magistrate or other special officer empowered by the Government in that behalf. For the decision of this case there are two points for consideration as to the meaning of this sentence. Does the expression 'specially empowered' refer only to 'other officer,' or also to 'any Magistrate'? And secondly, what is the meaning of the expression 'charges *preferred by* any Magistrate' or other officer specially empowered by the Government? The non-repetition of the word 'by' before the words 'other officer' is relied on as showing that *both* the Magistrate and other officer referred to in the clause should be persons specially empowered by Government. There is, no doubt, force in this argument, but it seems to me to be doubtful whether it is sound in this case. The powers of Magistrates are usually determined by general provisions in the Criminal Procedure Code or other statutory enactments. It does not appear that there was any provision of law at the time of the Letters Patent empowering the Government to give *special* authority to particular Magistrates to prefer a criminal charge. The non-repetition of the word 'by' before 'other officer' may be due to the fact that the legislature intended to put the Advocate-General under one category and 'Magistrate and other officer' under another and distinct category. After all, it would only be a matter of caution to repeat the word 'by' to show clearly that the qualification 'specially empowered' did not apply to the noun before it. Then with respect to the expression 'charges preferred by,' the contention on behalf of the Crown is that it means, as applied to a Magistrate, commitments

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made by him to the High Court. This is not the usual meaning of the expression. The preferring of a charge generally means the laying of a charge or complaint in order that it may be enquired into, and not a committal based on enquiry already made. This is certainly the meaning of the expression in this very sentence as applied to the Advocate-General. There is no apparent reason for giving it a different meaning in applying it to a Magistrate. The clause seems to authorize the High Court to try a person brought before it on a charge preferred by any Magistrate having authority to prefer it (without being specially empowered to do so by Government). There is nothing in the clause to show that the charge must be preferred directly to the High Court. Magistrates and other officers generally have no power to do so, though the Advocate-General has and always had. See Section 194, Criminal Procedure Code, and Cyclopædia of the Laws of England, Vol. I, under the heading 'Attorney-General,' page 624, Second Edition. It is not shown that any Magistrates or other officers besides the Advocate-General had, at the date of the Letters Patent, the power in any case to prefer a charge directly to the High Court. The clause does not seem to require more than that the charge in the case should have been preferred by a Magistrate having legal authority to do so and that the accused in the case should also be brought before the Court in a lawful manner. The charge against the accused in this case was admittedly preferred by a Magistrate, Mr. Cox. The accused were admittedly brought before this Court in a lawful manner.

I am not therefore satisfied that Clause 24 does not apply to the cases. But it is unnecessary to decide this question, as it is clear to me, for the reasons already mentioned, that Clauses 25 and 26 are applicable to *all* cases of original criminal trials before the High Court under whatever provision of law that trial may be held.

The first point :—

The first point that the Advocate-General's certificate states should be further considered by the Court is " the opinion of the majority of the Court that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon, and that it would be open to the court to convict on the uncorroborated testimony of an accomplice if the court was satisfied that the evidence was true." This would seem *prima facie* to be opposed to the very words of Section 133 of the Indian Evidence Act which lays down in positive terms that " a conviction is not illegal merely because it proceeds upon the uncorroborated

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testimony of an accomplice." The Advocate-General's meaning however is explained by the further statement in the certificate that "it requires to be further considered whether Section 133 of the Indian Evidence Act, read with Section 114, illustration (b), does not merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances." But again it is hardly possible to suppose that the Advocate-General meant to suggest that the presumption referred to is one which the court is directed by law to make in all cases of the testimony of an accomplice and requiring to be rebutted by other evidence. For, that would be directly contrary to the definition of 'may presume' in Section 4 of the Act, according to which "whenever it is provided by this Act, that the court 'may presume' a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it." The argument for the accused at the hearing was, and I take it the view suggested by the Advocate-General also was, that, notwithstanding the liberty given to the court not to regard a fact referred to in Section 114 as not proved and to call for proof of it, the meaning and intention of the section must be taken to be that *ordinarily* the presumption referred to in illustration (b) to section 114 must be made and that special circumstances must be found by the court whenever it does not do so. It need hardly be observed that it is not strictly correct to express the meaning by saying that the presumption of untrustworthiness must be found *to be rebutted* by special circumstances. Understanding the certificate in the sense just mentioned, I may, before dealing with the question raised therein, observe that it is not clear to my mind why the learned Advocate-General considered it necessary to make a certificate on the point in this case. The majority of the Special Bench—the learned Chief Justice and Ayling, J.—no doubt observe that it would be open to them to convict the accused on the uncorroborated testimony of the accomplices, even if it stood alone, if they were satisfied that that evidence was true and they do not expressly say that special reasons must exist for not presuming its untrustworthiness. But the conviction is not based by them, as far as I am able to see, on the testimony of the accomplices alone. After laying down the proposition of the law above mentioned, the learned Judges proceed to consider the nature of the corroborative evidence that is required in the case of accomplice's testimony. They then refer to the former statements of two of the accomplices to P. W. 31 as strongly corroborat-

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ing their evidence given at the trial. They deal with the objections raised by the accused to the admissibility of former statements of accomplices in evidence. They then say that the previous statements of the two approvers, Arumugam and Somasundaram, which they hold to be admissible in evidence, show that the defence theory that the evidence given by the approvers was the result of tutoring by the police or was concocted by the approvers themselves was quite unsustainable, and that, even apart from the previous statements to P. W. 31, it is impossible to accept the theory of tutoring or concoction. They say "the impression left in our minds of the three approver witnesses was favourable to the general truth of their story" and give reasons in support of that impression. They afterwards proceed to deal with the nature of the other corroborative evidence adduced in the case and of the defence set up by the accused. They then proceed to deal with all the evidence on record against each of the accused persons including both the testimony of the approvers and the corroborative evidence adduced by the prosecution, and with the evidence let in by each of the accused on his behalf, and come to a conclusion with respect to the guilt or innocence of each of the accused, on the whole of the evidence let in both for the prosecution and for the defence. The learned Judges do not say, as indeed it was unnecessary for them to say, whether they would convict any of the accused on the evidence of the approvers alone. Even if we should now come to the conclusion that the general proposition enunciated by the majority of the Special Bench that it was open to them to convict the accused on the uncorroborated evidence of the approvers is not sound, this conclusion would not affect their judgment which is not based on such uncorroborated accomplice's testimony alone. In my opinion, it would be open to us, sitting as a court of review, to decline to express any opinion on the point raised in the Advocate-General's certificate. I may further point out that the counsel for the accused did not, during the arguments before us, question the soundness of the proposition laid down by the majority that they had the power, as a matter of law, to convict the accused on the uncorroborated evidence of the approvers if they believed that evidence. They could hardly venture to do so. The argument before us was that the learned Judges should have presumed the untrustworthiness of the evidence of the accomplices unless they could refer to special circumstances justifying their not doing so, and that no such special circumstances are referred to in their judgment. They have therefore, it is urged, committed an error of law in not making the

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presumption. But assuming this argument is well founded, it is, as already pointed out, altogether irrelevant as the conviction is not based on the testimony of the accomplices alone.

Although for the reasons mentioned above, it is open to the court to decline to deal with the question raised in the certificate, I consider it desirable to state my opinion on it as it has been discussed at great length, both on behalf of the accused and the Crown. The arguments traversed a wide field dealing with the English law relating to the evidence of accomplices from very early times and the law in India both before and after the enactment of the Indian Evidence Act I of 1872. The law in India at the present day must be found in the provisions contained in the Indian Evidence Act. It is a complete code of the law of evidence applicable to this country. It purports not only to consolidate and to amend, but also to define the law of evidence. See *Rajib Panda* v. *Lakhan Sendh Mahapatra*[1]. If the language of the provisions of the code is clear, then that language is decisive of the law. (See *Bank of England* v. *Vagliano*,[2] and *Norendranath Sircar* v. *Kamalbasini Dasi*,[3]) though, where the words are not clear, light may be derived as to their meaning from an investigation of the law as it was understood prior to its enactment. See *Brown* v. *Mclachlan*,[4] *Robinson* v. *Canadian Pacific Railway Company*,[5] *Jogendra Chandra Roy* v. *Shyam Das*.[6] The principle laid down in *Rex* v. *Abrahams*,[7] with regard to the construction of statutes, which purport merely to consolidate the previous law on a subject, does not hold good in the interpretation of a statute which codifies a particular branch of law. If, then, the provisions of sections 133 and 114 of the Indian Evidence Act express with clearness and certainty the law to be enforced with respect to the testimony of accomplices, it would be of little use to investigate whether those provisions are in accordance with the previous law either in England or in India.

It was urged on behalf of the accused that the majority of the Special Bench take the law in this country to be in accordance with the English law on the subject; and the opinions of judges in other cases to the same effect are also cited to induce us to hold that the question should be decided in accordance with the English law. It is not however denied that the proper conclusion on the question should really be arrived at by the construction of the provisions to

1. (1899) I. L. R. 27 C. 11.
2. (1891) L. R. App. Cas. 107.
3. (1896) I. L. R. 23 C. 563.
4. (1872) 4 P. C. 543 at p. 550.
5. (1892) A. C. 481 at p. 487.
6. (1909) I. L. R. 36 C. 543
7. (1904) 2 K. B. 859.

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be found in the Indian Evidence Act. My investigation of the English case law has not helped to make the conclusion to be arrived at on this point more certain than they would otherwise be. The counsel for the accused rest the strength of their case on section 114, illustration (b), of the Indian Evidence Act, which, they say, materially qualifies Section 133, which declares that the conviction of an accused on the testimony of an accomplice alone is legal. There can be no doubt that section 114 should be read along with Section 133 in order to determine the manner in which the testimony of an accomplice should be dealt with before basing a conviction on his evidence alone.

The Indian Evidence Act recognizes two classes of presumptions, corresponding to what are known as rebuttable presumptions of law and presumptions of fact in English law. Irrebuttable presumptions under the English law are also recognized in the Act in sections 112 and 113, which make certain facts conclusive proof of other facts. All the three classes are explained in Section 4 of the Act. It is impossible to attach weight to any argument which is calculated to confound the two classes of presumptions which are clearly distinguished in the Act. It is not possible to countenance the view that the court is absolutely bound to regard a fact as proved, which, according to the positive language of Section 4, it may either regard as proved or may call proof of. On this point it is useless to appeal to the rules of English law to justify a departure from the provisions of the Indian Act. In English law it is by no means clear what presumptions are regarded as presumptions of law and what are regarded merely as presumptions of fact. The same presumption is regarded, sometimes as one of law and sometimes as one of fact. Another class of presumptions is also recognized in 'Best on Evidence' as 'mixed presumptions' or 'presumptions of mixed law and fact,' or, 'presumptions of fact recognized by law.' The learned author says —" These hold an intermediate place between the two former, and consist chiefly of certain presumptive inferences which, from their strength, importance, or frequent occurrence, attract, as it were, the observation of the law; and from being constantly recommended by judges and acted on by juries, become in time as familiar to the courts as presumptions of law, and occupy nearly as important a place in the administration of justice." He also observes, " Unfortunately however, the line of demarcation between the different species of presumptions has not always been observed with the requisite precision. We find the same presumption spoken of by judges, sometimes as a presumption of law sometimes as a presumption of fact, sometimes as a presumption which

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juries should be advised to make, and sometimes as one which it was obligatory on them to make." (Page 280 X Edition). To give only one illustration, the author regards the presumption that legal acts have been performed with the solemnities required by law as a presumption of fact—see page 308. But in 'Taylor on Evidence' the same presumption is regarded as one of law. According to section 114 of the Indian Evidence Act, the presumption is only one of fact. Sir James Fitzjames Stephen observes, with regard to Section 114 of the Act, "Finally, it declares in Section 114 that the court may in all cases whatever, draw from the facts before it whatever inferences it thinks just. The terms of the Section are such as to reduce to their proper position of mere maxims which are to be applied to facts by the courts in their discretion, a large number of presumptions to which the English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustration." In applying the English law to this country it must be remembered that in England the law of Evidence, had a long and laboured development. Several classes of persons were at one time regarded as incompetent to testify at all. An accomplice was one of the classes of persons regarded with disfavour as a witness. Wigmore in his learned treatise on Evidence points out (see Section 526) "It was frequently urged against an accomplice, during the 1600s and 1700s, that since by his own confession he was guilty of crime, this turpitude thus acknowledged made him as incompetent as if it were proved by conviction for the crime. This argument is only broadly related to the above maxim, (*i. e., Allegans Turpitudinem Suam allegans audiendus est*) and yet, this relation is frequently noticed in the opinions dealing with the other instances. It must be distinguished from the argument of disqualification as a *co-indictee* and of disqualification by reason of a promise of pardon. The argument, however, was judicially repudiated from the very beginning, partly on the ground of necessity, partly on the ground that turpitude, though self-confessed, was no hindrance unless there had been a conviction of crime." At common law again when two or more persons were tried upon the same charge, each was naturally disqualified to give evidence on account of their interest. This ground of disability was also in time swept away. With regard to the value of an accomplice's testimony, Wigmore observes (Section 2056), "Through the 1600s and 1700s it had to be ruled again and again that they were to be received as witnesses. But for a long time no question was made as to the sufficiency of their testimony when admitted. The quantitative conception of an oath tended to

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keep this question in the back-ground. An oath, in the notions of the time, had a certain dead-weight of its own ; one oath was as good as another oath. Should a witness once get in, the harm (they thought) was done ; for there would be little weighing of the comparative quality of different persons' oaths. The struggle, therefore, was made at the threshold. As time went on, and the modern conception of testimony developed, the possibility of admitting a witness and yet discriminating as to the qualitative sufficiency of this testimony became more apparent ; and the way was open for the consideration of this question. In a few instances, as the 1700s wore on, and even before then, judicial suggestions are found as to the feasibility of such a discrimination. But not until the end of that century does any court seem to have acted upon such a suggestion in its directions to the jury. About that time there comes into acceptance a general practice to discourage a conviction founded solely upon the testimony of an accomplice uncorroborated. In *R.* v. *Smith and Davies*,[1] the court thought it too dangerous to suffer a conviction under such unsupported testimony. However, it was established in *R* v. *Atwood*,[2] that such a conviction was perfectly legal. But although the question of the admissibility of the evidence of an accomplice had been long settled and the legality of a conviction based on the sole testimony of an accomplice was established in *R.* v. *Atwood*, the sentiment against placing reliance on such evidence could not die out. It was bound to live and to remain strong under a system of law where questions of fact, both in civil and criminal matters, were left to the determination of juries. Reforms advocated by advanced thinkers no doubt succeeded in abolishing both artificial rules of admissibility and antiquated conceptions of the quantitative appraisement of evidence. But so long as the settlement of facts was left to juries, judges could not but be impressed with the necessity of guiding their untrained appreciation of evidence and restraining their vagaries both by advices and directions deemed necessary for rendering justice in individual cases. The legislature itself found it necessary to enact that the evidence of highly interested witnesses should be materially corroborated by independent evidence in particular classes of cases. In the case of an accomplice, moreover, he could be called as a witness only with the sanction and under the orders of the court after complying with certain legal formalities ; the opinions of individual judges regarding the unreliability of accomplices without corroboration could be enforced by refusing permission for their

1. (1784) 1 L. Cr. L. IV. Ed. 479.
2. (1788) 1 L. Cr. L. 464.

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examination as witnesses. The result is that we find much variety and uncertainty in the manner in which accomplice evidence was treated in decided cases, while at the same time the principle is reiterated from time to time that there is no rule of law restraining the action of the judges and juries in dealing with such evidence, and judges ostensibly refrained from any attempt to set up any presumption of law against its trustworthiness. The danger of ordinarily convicting on the uncorroborated testimony of an accomplice being manifest, it came to be regarded as the duty of the presiding judge to draw their attention to the danger, in the same manner as it was his duty also to make such other comments on the evidence adduced as the nature of the case required. An examination of the decisions, however, shows much diversity in the actual practice of judges in the manner in which this duty was discharged. *In R.* v. *Mullins*,[1] Maule, J. observed as follows:—"The truth of the matter is, there is no rule of law at all that an accomplice cannot be believed unless he is confirmed......It is an observation addressed, not to the court to exclude the evidence, but addressed to the jury who have to weigh the evidence, and it is for them to say whether the confirmation will satisfy them or whether they will be satisfied without any. If they are satisfied without any confirmation they may be, and their verdict may be an honest and just and true one.......The directions of judges given to juries in that respect are not directions in point of law which juries are bound to adopt, but observations respecting facts, which judges are very properly in the habit of giving, because, with respect to matters of fact, the judge, as well as the counsel upon both sides, endeavour to assist the jury." The principle laid down in the above case was not always observed. Permission to examine an accomplice as a witness was sometimes refused on the ground that no corroborative evidence was forthcoming. "Where several prisoners were committed as principals, and several as receivers, but no corroboration could be given as to the receivers, against whom the evidence of the accomplice was required, Gurney, B. refused to permit one of the principals to become a witness. (*R.* v. *Mellor*,[2] So in *R.* v. *Saunders*,[3] on a motion to admit an accomplice, Patteson, J. said 'I doubt whether I shall allow him to be a witness. If you want him for the purpose of identification, and there is no corroboration, that will not do.' In *R* v. *Salt*,[4] where there was no corroboration of an accomplice, Wightman, J. refused to allow him to become a

1. (1848) 7 St. Tr. N. S. 1100, (3 Cox. C. C. 526.) 2. (1833) Staff. Sum. Ass.
3. (1842) Worc. Spr. Ass. 4. (1843) Staff. Spr. Assizes.

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witness. And again, in *R.* v. *Sparks*,[1] where counsel for the prosecution applied for leave to call an accomplice who had pleaded guilty, Hill, J. refused to permit it until the other evidence had been given in order to see whether it was sufficient to corroborate that of the accomplice." (Roscoe's Criminal Evidence, XIII Edition, page 108). These cases proceeded certainly on the footing that the accused should not be convicted on the evidence of an accomplice alone and that there was a legal presumption against its trustworthiness. In *R.* v. *Farler*,[2] Abinger, C. B. observed that the practice of requiring confirmation of such testimony has obtained so much sanction from legal authority that it deserves all the reverence of law. The learned Judge, however, did not direct the jury to acquit the accused. He said "I would suggest to you that the circumstances are too slight to justify you in acting on the evidence." This was no more than an expression of his own opinion on the facts of the case which a judge is always justified in giving. In *Rex.* v. *Jones*,[3] Ellenborough, J. treated the advice to be given by a judge against acting on the testimony of an accomplice as resting in his discretion. In *Queen* v. *Boyes*,[4] Wightman and Crompton, JJ. took the same view, Wightman J. observing. "The application of that rule, however, if a matter for the direction of the judge by whom the accused is tried and here he appears to have drawn the attention of the jury to the point." The learned Judges approved of the ruling of the Court of Crown Cases Reserved in *R.* v. *Stubbs*,[5] where the learned judges held that the practice of requiring corroboration of an accomplice is not a rule of law. In *Reg.* v. *Gallaher*,[6] the judge's statement to the jury regarding the practice is spoken of as a recommendation to them. *In Queen* v. *Avery*,[7] the judge refused to withdraw the case from the jury on the ground that there was no corroboration of the accomplice. In *Rex* v. *Hastings*,[8] the judge in giving directions on the application of the prosecution said that the evidence in the case must be adduced though it was admitted that there would be no evidence forthcoming to corroborate the accomplice in the case. Further the rule regarding the necessity for corroboration was often relaxed in the case of misdemeanours—See Archbold's Criminal Pleading, XXIII Edition, page 321. On the other hand, Patteson J., In *Reg.* v. *Jellyman*,[9] and Littledale, J. in *R.* v. *wells*,[10] told the jury that they ought to acquit unless they were convinced that there

1. (1858) 1 F. and F. 388.
2. (1838) 8 C. and P. 106.
3. (1810) 2 Camp 131.
4. (1861) 1 B. and S. 311.
5. (1855) 25 L. J. M. C. 16.
6. (1883) 15 Cox. C. C. 291 at p. 318.
7. (1838) 1 Cox. C. C. 206.
8. (1822) 7. C. and P. 152.
9. (1838) 8 C. and p. 604.
10. (1840) 1 M. and M. 326.

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was sufficient corroboration. One rule alone may be regarded as established in the long run that a judge is bound to caution the jury against the danger of acting on the testimony of an accomplice without corroboration. In *Rex* v. *Tate*,[1] Lord Alvertson, C. J. while agreeing that there is no definite rule of law that a prisoner cannot be convicted on the uncorroborated evidence of an accomplice, said " that in his opinion it was of the highest importance that the jury should be cautioned against accepting the evidence of an accomplice without corroboration." There is nothing supporting a contrary view in *In re Meunier*.[2] In that case, where the question was whether a Magistrate was right in passing an order for the surrender of the accused to the French Government under the Extradition Act, on the ground that there was no proper corroboration of the evidence of an accomplice, Cave and Collins, JJ. held that the absence of corroboration was no ground for holding that the case was not to be laid before the jury. Cave, J. observed, "The Magistrate has a discretion in each case as to whether the evidence is, or is not, sufficient to justify a committal." Cases are not wanting however even in recent years in which judges have regarded the presumption against accomplices as one of law. Wills, J. in 1895, " withdrew from the jury one of the counts in an indictment upon which there was very clear and unshaken evidence by the accomplice but nothing else." And Baron Bramwell is stated to have followed a similar course in another case. See ' Wills on Circumstantial Evidence', page 365, also ' Roscoe and Granger on Criminal Evidence,' 156. In *Rex* v. *Beauchamp*,[3] it was held only that the jury should be cautioned. But in *Rex* v. *Everst*,[4] Darling, J. is reported to have said that " the *direction* should be to acquit unless there was corroboration connecting the accused with the offence." And in *Rex* v. *John Warren*,[5] Channell, J. is said to have expressed himself in similar terms.

A review of the English cases shows the uncertainty of the law in that country as to the nature and extent of the presumption. The learned editors of ' Roscoe on Criminal Evidence,' XIII Edition, observe, at page 110, " Thus the law remains in that anamolous state in which the bare existence of a principle is acknowledged, but which principle is constantly disapproved of and frequently violated. As the law now stands, it is universally agreed by all the authorities that if the accomplice were uncorroborated a judge would be wrong who did not advise the jury not to convict,

1. (1908) 2 K. B. 680.
2. (1894) 2 Q. B. 415.
3. (1909) 73 J. P. 223.
4. (1909) 73 J. P. 269.
5. (1909) 73 J. P. 356.

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whereas the Court of Criminal Appeal would be bound to pronounce an opinion that a judge who did not advise them was right." The learned editors of 'Russell on Crimes', VI Edition, Vol. III, page 645, point out that it is only by holding that the practice of requiring corroborative evidence must rest on the discretion of the judge that it can be reconciled with the doctrine that the legal conviction may take place upon the unsupported evidence of an accomplice. This statement is scarcely in accordance with *Rex* v. *Tate.*[1]

It seems to me that having regard to the condition of the case law in England it would be safe to proceed to determine the law in this country by a consideration, mainly, if not solely, of the provisions of the Indian Evidence Act. We start with the fact that the presumption that an accomplice is unworthy of credit unless he is corroborated in material particulars is one which the court may or may not make. It is impossible to hold that the court is in all cases bound to make the presumption without regard to the particular facts and circumstances of each case; for, in that case, the legislature would have said that the court 'shall presume' the untrustworthiness of an accomplice. If the case is tried by a jury the judge cannot tell them that they are bound to make the presumption. It would be his duty to inform them that they are at liberty to make it or not. Taking it that it is his further duty to draw their attention to the facts which would make it proper that the presumption should be made and that he is entitled to express his own opinion that in the particular case the presumption would be a proper one, it cannot be denied that he is equally entitled to say that, in his opinion, it would be proper not to make the presumption in any particular case. If the case is tried by the judge himself without a jury, it would then be left to him whether in the circumstances of the case he would make the presumption or not. But he is of course bound to exercise his judicial discretion to presume or not to do so in a judicial and legal manner. "A presumption of fact is a rule of law that a fact otherwise doubtful may be inferred from a fact which is proved" (Lawson on the Law of Presumptive Evidence, page 639). On an appeal from his decision it would be open to the court of appeal to consider when he was right or wrong in not making the presumption in the circumstances. If the question be whether there is any error of law in his judgment, the court is entitled to consider whether the rule embodied in Section 114 was present to his mind and whether he exercised his discretion after considering the materials on record. His judgment will be examined for the purpose of enabling the court of law to decide

1. (1908) 2 K. B. 680.

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whether the discretion was exercised in a legal manner. If he has not made the presumption and has given no reasons for not doing so, it would be open to a court of review or revision to arrive at the conclusion that the discretion has not been exercised in a legal manner. The decision of the question would depend on the consideration of his judgment as a whole. In a jury case it is the duty of the judge in charging the jury to sum up the evidence for the prosecution and the defence and to lay down the law by which the jury are to be guided, Section 297, Criminal Procedure Code. This will include the duty to draw attention to the presumptions mentioned in Section 114 of the Indian Evidence Act and also to the circumstances in the particular case having a bearing on the application of the rule. Up to this point I think there is not much room for doubt. But can it further be laid down that it is the duty of a judge deciding the facts to make the presumption that an uncorroborated accomplice is unworthy of cerdit unless there be special reasons which would justify the refusal to make it? On this point I am of opinion that there is room for the growth of judiciary law. Judges are entitled to lay down a rule that although the legislature has given the court the discretion to make a particular presumption or not, according to the circumstances, the proper course for the court to follow is to make the presumption unless there be special occasion for not doing so. This does not deprive the court of the right given by the legislature to exercise its discretion. Whether a rule should be laid down guiding and controlling the exercise of the discretion must depend on the nature of the presumption of fact in question. If there be a course of decisions with respect to any of the nine presumptions mentioned in the section, it would be wise not to depart from what has been consistently laid down by the courts. It must be recognised that the illustrations to the section embody presumptions which are regarded as of great value in English law and some of them are regarded as presumptions of law there. Thus illustration (*a*) is treated as a presumption of law in England. So also illustration (*e*). Illustration (*i*) relates to a case where the onus would be regarded as shifted in consequence of the fact referred to therein. Illustration (*g*) also embodies a presumption of much weight. Illustration (*c*) has been converted into a presumption of law in the Negotiable Instruments Act. With regard to illustration (*b*) where the accomplice has not already been convicted of the offence in which he took part and has given evidence in the hope of a pardon, his evidence is of a particularly unworthy character. There may no doubt be circumstances in any particular case which would justify the court in not making the presumption,

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But I think it would be reasonable to hold that there must be some reason given for not making the presumption in such a case. The same observation will hold good with regard to illustration (*e*) which refers to the presumption that judicial and official acts have been regularly performed.

When we examine the case law on the point we find that though the rule of law embodied in Sections 114 and 133 of the Indian Evidence Act appears reasonably simple and clear, the sentiment against the testimony of accomplice has led to some extent to the importation of the indefinite practice of English judges in charging juries and to a tendency on the part of some judges to make the desirability of corroborative evidence in such cases a rule of law, notwithstanding the refusal of the legislature to treat it as such in the Indian Evidence Act. In the leading case of *R.* v. *Elahee Buksh*,[1] the Calcutta High Court held that it was the duty of a judge, in summing up to the jury, to make such observation as to the credit to be attached to particular witnesses as the circumstances of the case rendered necessary. Peacock C. J. observed, "That the omission to follow a practice which is universally adopted by the judges in England would be a ground of appeal against a conviction upon a verdict of guilty and would be an error of law." The learned judge could not be taken to have meant that the judge should advise the jury not to convict on accomplice's evidence, if his own opinion is that in the particular circumstances of the case it was trustworthy. In 4 M. H. C. R, Appendix, page 7, this Court laid down the proper course in such cases to be to tell the jury or the assessors "that, as a general rule of practice, it is considered unsafe to convict upon such evidence and to point out any circumstances in the particular case which in the opinion of the judge afford a sufficient reason for relying upon the evidence in that case." In *Reg.* v. *Ramasami Padaychi*,[1] Morgan, C. J. and Kindersley, J. held that "the court or jury is required by Section 114 to take into consideration certain facts with the view to ascertain the probability of the story told.........And the rule in this Section is thus brought to coincide with the rule observed in England that though the tainted testimony of an accomplice should be carefully scanned and received with caution and may be treated as unworthy of credit, yet, if the jury in the one case or the court in the other credits the evidence, a conviction proceeding upon it is not illegal." It will be observed that all that is required according to the learned judges is that the probability of the story should be ascertained

1. (1866) 5 W. R. C. R. 80. 2. (1878) I. L. R. 1 M. 394.

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and the evidence of the accomplice should be scanned and received with caution. In *Queen-Empress* v. *Arumuga*,[1] Collins C. J. and Muthusami Aiyar, J. set aside a conviction on the ground that "the Sessions Judge should have cautioned the jury not to accept an approver's evidence unless it was corroborated." This observation in my opinion went too far unless it was based on the facts of the particular case. The learned judges could hardly have meant that it was not equally the judge's duty to tell them, if he considered it proper to do so, that in the circumstances of the case the accomplice's evidence was trustworthy without corroboration. In *King Emperor* v. *Mohiuddin Sahib*,[2] reference is made to the English decisions laying down that the testimony of the approver *ought* to be corroborated in material particulars. It was held that such corroboration existed in that case. In *Emperor* v. *Edward William Smither*,[3] Davies and Benson, JJ. stated with more caution that a judge ought not to omit to caution the jury with respect to the credit to be attached to accomplices. In *Ramasami Gounden* v. *Emperor*,[4] Subrahmania Aiyar, J. observes that the rule laid down in Section 114 of the Indian Evidence Act is only a precept of caution. He says, "To claim for it greater potency in the face of Section 133 of the Indian Evidence Act would be to introduce an artificial scale of credit and 'nothing can be more absurd' to borrow from the language of Lord Denman in *King* v. *Harborne*,[5] "than that there should be some rigid presumptions as to matters of fact where the only questions ought to be what evidence is admissible and what inferences may *fairly* be drawn from it." Bhashyam Iyengar, J. said "I am however unable to agree with Boddam, J. that if the first witness was only an accomplice it would be the duty of the judge to direct the jury that there was not sufficient evidence before them upon which they would be justified in finding the accused guilty and with all respect I should say that this would be misdirection. In *Rex* v. *Boyes*,[6] Cockburn, C. J., adverting to counsel's argument that Martin, B. ought to have directed the jury not to act upon the uncorroborated testimony of an accomplice, protested against its being the duty of the judge to direct the jury to acquit because the evidence of an accomplice is uncorroborated and added that the judge ought not to have told the jury to acquit if the evidence was uncorroborated. It may be that, except under very special circumstances, the settled

1. (1888) I. L. R. 12 M. 196.
2. (1901) I. L. R. 25 M. 143.
3. (1902) I. L. R. 26 M. 1.
4. (1903) I. L. R. 27 M. 271.
5. (1835) 2 A. and E. 540. s. c. 111, E, R, P. 209
6. (1861) 9 Cox. C. C. 32.

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course of practice is not to convict a prisoner upon the sole and uncorroborated testimony of an accomplice and if, in the opinion of the judge there are no special circumstances, which would induce him to give credit to the evidence of the accomplice and convict the prisoner on his sole uncorroborated testimony, he may, no doubt, under Sub-section 2 of Section 298 of the Code of Criminal Procedure, express such opinion to the jury and in that sense advise them to acquit the prisoner."

The latest decision of this court seems to be *Vyasa Row* v. *Emperor*,[1] I do not think that my learned brother Abdur Rahim, J. has laid down in that case any hard and fast rule that it is not open to a judge in *any* case to act on the uncorroborated testimony of an accomplice. He no doubt points out the danger of doing so and refers to the practice on the part of judges in general requiring corroborative evidence. In *Queen* v. *Sadhu Mundul*,[2] Phear, J. held that the omission to give the usual caution to the jury was a misdirection and that he was wrong in the particular case in saying to the jury that it was not proper or necessary for him to tell them that the evidence of the accomplice was to be received with caution. The learned judge said, "that it is the duty of the court which in any particular case has to deal with accomplice's testimony, to consider whether this maxim applies to exclude that testimony or not; in other words, to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though at the same time the court may rightly in exceptional cases, notwithstanding the maxim and in the absence of this corroboration, give credit to the accomplice's testimony against the accused, if it sees good reason for doing so, upon grounds other than, so to speak, the personal corroboration." This passage seems to show that the judge must, in order to avoid making the presumption, find good reason for doing so. In *Queen-Empress* v. *Deodhar Singh*,[3] it is stated that the practice of requiring corroboration is a rule of almost universal application, and in *Kamala Prasad* v. *Sital Prasad*,[4] it is stated to be almost a part of the law itself. The question however in both those cases was whether certain witnesses were really in the position of accomplices. In *Jamiruddin Masalli* v. *Emperor*,[5] Prinsep and Stephen JJ. held that the jury should have been told that it was not safe to convict on the uncorroborated testimony of an accomplice, though the Sessions Judge had charged them that corroboration

1. (1911) 1 M. W. N. 327.
2. (1874) 21 W. R. C. R. 69.
3. (1899) I. L. R. 27 C. 144.
4. (1901) I. L. R. 28 C. 339.
5. (1902) I. L. R. 29 C. 782.

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was necessary. *Emperor* v. *Lalit Mohan Chuckerbutty*,[1] cannot be regarded as throwing any light on the question. Jenkins, C. J. says that admittedly the testimony of accomplices required to be corroborated in material particulars and no question arose as to whether the court was bound to make the presumption mentioned in Section 114, illustration (*b*). In *Queen-Empress* v. *Ram Saran*,[2] Straight, J. merely observed that it is a practice of judges both in England and in India to guard their minds carefully against acting upon such evidence when uncorroborated and when trying a case with a jury, to warn the jury that such course is unsafe. In *Queen* v. *Empress Gobardhan*,[3] Edge, C. J. points out that a jury being bound to convict on the uncorroborated evidence of an approver if they believe it, a judge cannot direct them to acquit the accused in the absence of corroborative evidence. He says, "A judge would advise a jury that it would be unsafe to act upon, in other words, to believe, the uncorrroborated evidence of an accomplice, as he would advise the jury not to act upon the evidence of any other witness whose evidence might from any cause be open to suspicion. But in either case he would have to tell the jury that if they believed the evidence they might legally convict the prisoner." I entirely agree with this statemant of the law, with this addition that, it is the duty of the judge to draw the attention of the jury to any circumstance either in favour of or against the credibility of the accomplice. In *Queen-Empress* v. *Maganlal and Motilal*, [4] Scott, J. observes, with respect to cases tried by a judge himself, "But it much clearly appear to the court sitting in revision that the character of the witness was persent in his mind when the judge or magistrate came to such a conclusion (that is, that the evidence of the accomplice was trustworthy). But if that is so, there is no ground for interference of a revisional character.' Jardine, J's. observation are not inconsistent with this. He observes "These reasons for requiring independent corroboration, so strongly insisted upon by Sir Barnes Peacock, are not expressly mentioned by the Magistrate." Bayley, J. would seem to have gone further. He said "He had nothing before him but the corrupt evidence of confessed accomplice. His omission to consider the necessity that such evidence *should be corroborated* by that of one or more other of untainted witnesses, is in my opinion an error by which the accused undoubtedly have been prejudiced." It is not quite clear, however, whether the learned judge intended to lay down any

1. (1911) I. L. R. 38 C. 559 at p. 579.
2. (1885) I. L. R. 8 A. 306.
3. (1887) I. L. R. 9 A 528.
4. (1889) I. L. R. 14 B. 115.

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general rule that corroboration was necessary in all cases. In *Queen Empress* v. *Chagan Dayaram*,[1] Birdwood, J. was of opinion that the High Court could in revision consider whether there were good grounds to warrant the lower court in not making the presumption that an accomplice's witness was untrustworthy. Jardine J. said "The rule in Section 114 and that in Section 133 are part of one subject, and both are found in most of the greatest judgments mentioned in our judgments in that case (that is, 14 Bom. 115) and neither section is to be ignored in the exercise of judicial discretion. The illustration (*b*) is, however, the rule and when it is departed from, I think the court should show or that it should appear that the circumstances justify the exceptional treatment of the case." No other case of importance has been brought to our notice at the arguments. The observations of the Bombay High Court in *Queen Empress* v. *Maganlal*,[2] and *Queen Empress* v. *Changan Dayaram*, of Phear, J. in *Queen* v. *Sadha Mundul*,[3] and of Bashyam Iyengar, J. in *Ramasami Gounden* v. *Emperor*,[4] are authorities for the position that it would be right to require that a judge should ordinarily presume the untrustworthiness of an accomplice. When a case is tried without a jury the judgment should contain certain materials to show to a court of appeal or revision that this presumption was borne in mind by the judge and the reasons that weighed with him for not making the presumption. I would not put it, as suggested in the Advocate-General's certificate, that the presumption of untrustworthiness should be made in all cases and that a conviction without independent corroboration can be sustained only where the presumption is rebutted by special circumstances. I do not think that there is really anything in the judgment of the majority of the Special Bench to show that the learned Judges really took a different view though they do not consider the question whether special reasons should be exhibited for not requiring corroboration. Their Lordships say that it should be borne in mind that the evidence of the approvers is tainted evidence. Scrutinized with the utmost care and accepted with the greatest caution and considered in the light of the circumstances in which it is given and in the light of all other circumstances in the case of which evidence is legally admissible, then, if it is found to be trustworthy, it must be acted on. As I have already pointed out, the certificate of the Advocate-General on the question does not raise any question of practical importance in the case. The learned Judges have in fact given plenty of

1. (1890) I. L. R. 14 B. 331.
2. (1889) I. L. R. 14 B. 115.
3. (1874) 21 W. R. C. R. 69.
4. (1903) I. L. R. R. 27 M. 271.

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reasons which in their opinion were sufficient for considering the evidence of the approvers in the case generally trustworthy. This Court, dealing, as a court of review, with the question whether there is any error of law in the view taken by the majority, is not concerned to consider whether those reasons were, as a matter of fact, sufficient to justify the acceptance of the approvers' evidence as generally true. That is entirely a question of fact and we have not, at this stage of the case, at any rate, to deal with it further.

Mr. Govindaraghava Aiyar raised a further contention on the first point in the Advocate-General's certificate, that the majority of the Special Bench were wrong in their view as to what constitutes '*material particulars*' in respect of which corroboration of an accomplice's testimony is required. But this question is not *raised* in the certificate of the Advocate-General. The certificate says that the opinion that the evidence of an accomplice need not be corroborated in material particulars requires to be further considered. It does not state that the opinion of the majority as to what are *material particulars* requires to be further considered. Mr. Govindaraghava Aiyar then claimed to argue this question apart from the certificate of the Advocate-General. His argument is that once the Advocate-General certifies that the decision of the court on any question of law arising at the original trial is in his opinion wrong and that any question of law requires in his opinion to be further considered, the whole case is open before the court reviewing the judgment. Clause 26 of the Letters Patent provides that " on its being certified by the said Advocate-General that in his judgment there is an error in the decision of a point or points of law decided by the court of original criminal jurisdiction, or that a point or points of law which has or have been decided by the said court should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary and finally determine such point or points of law, and thereupon to alter the sentence passed by the court of original jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right." It is contended that the clause gives power to the Court, whenever a certificate has been granted by the Advocate-General, to review the case or any part of it that the court may seem fit to review and that practically the whole case becomes open when a certificate is granted. This will make the review practically an appeal, while Clause 25 provides that " No appeal shall lie from any sentence or order in any criminal trial of the High court in its original criminal jurisdiction." Mr. Govindaraghava

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Aiyar admits that this would be the result, with the difference that the court has a discretion to decide how much and what portion of the judgment it would review. But this is not the language of the clause. The statement in it is that "the court shall have power and authority to review the case or such part of it as may be *necessary*", not *as the court may think fit*. Now what is the meaning of the expression '*necessary*'? Necessary for what?. Obviously, I think, for deciding the point or points of law reserved or certified as requiring consideration. No other meaning can, in my opinion, be suggested. This is rendered clearer by what follows, "and finally determine such point or points of law." The clause clearly means that the court should finally determine the points of law and for that purpose shall have power to review the whole or any part of the case that may be necessary. Then the clause proceeds to state what the court is to do after determining the point or points of law. It has then power "to alter the sentence passed by the court of original jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right." If the Court confirms the decision passed at the trial on the point or points of law, then nothing further remains to be done. If, on the other hand, it reverses the decision on any point or points of law, then it has to consider what judgment it should pass. The power given to the court under Clause 26 is similar to the power given to the court of Crown Cases Reserved by 11 and 12 Vict., Cap. 78, with an important modification. It was considered that according to that statute if the decision of the trying court on a material point of law was reversed by the 'Court of Crown Cases Reserved' that court had no power to consider whether the judgment could be upheld, notwithstanding its opinion on the question of law, and was bound to quash the conviction, Clause 26 of the Letters Patent, on the other hand empowers the court to pass such judgment as it shall deem right—a power similar to what is conferred on courts of appeal by Section 167 of the Indian Evidence Act. The court is entitled to consider whether, notwithstanding that it may reverse the opinion of the trying court on any question or questions of law, conclusion of that court on the case as a whole should be disturbed, or what is proper judgment to be passed in the case. The question of law might possibly affect only the sentence to be passed on the accused and in such a case it would be sufficient for the court of review to alter the sentence passed by the court of original jurisdiction. In other cases it would be necessary to consider whether the remaining evidence is sufficient to justify the conviction. Mr. Govindaraghava Aiyar was not able to

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cite any precedent in support of his contention. On the other hand, the observations of Devar, Chandavarkar and Beaman, JJ. in *Emperor* v. *Narayan Raghunath Patki,*[1] are against his contention. He referred to an observation in the judgment of this Court in *Subrahmania Aiyar* v. *King-Emperor.*[2] That was also a case under Clause 26 of the Letters Patent. An objection to the admissibility of an approver's evidence was allowed. But the Crown contended that, notwithstanding the validity of the objection, the evidence was otherwise admissible. The question was, whether the Crown was entitled to raise that question. The point was one which arose as the result of the view taken by the court on a question raised in the Advocate-General's certificate. Such question would certainly come within the purview of the court's jurisdiction on review. The case is not similar to the present one. It was further urged that the clause empowering the court to review the case or such portion of it as might be necessary was referred to in certain decisions as empowering the court to consider what course should be pursued when it reverses the finding of the court of trial on a question of law. I do not feel pressed by this argument. It is really the later clause empowering the court to pass such judgment as might be necessary, that in my opinion entitles it to consider the merits of the case when the result of its opinion on a point raised in the certificate renders this course necessary. Assuming that it was stated in the decisions relied on that the court had the right to review the case in support of the contention that it could examine the merits, I would understand such language as used in the broad sense of the term 'review' and not as placing reliance on any power of review expressly conferred by the clause. I am of opinion that it is not open to the accused at this stage of the case to raise any question of law not included in the certificate of the Advocate-General.

The Second Point.—

The second point in the certificate of the Advocate-General is that the opinion of the majority of the Judges that the previous statement of an accomplice can legally amount to corroboration of the evidence given by him at the trial should be further considered. These previous statements are of two kinds, (1) the statements made by the approver, P. W. 6 and P. W. 12, to Veeraraghava Aiyar, P. W. 31, (2) the statements made to the Magistrate, Mr. Cox, and recorded by him under Section 164, Criminal Procedure Code. It

1. (1907) I. L. R. 32 B. 111.

2. (1901) I. L. R. 25 M. 61.

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appears from the statements made by counsel on both sides that no objection was taken at the trial to the admission of the approvers, Arumugam and Somasundaram, on the ground that they were not receivable at all as relevant under Section 157 of the Indian Evidence Act for any purpose. The objection raised at the trial on the score of relevancy appears to have been that the statements were not admissible as furnishing corroboration of the accomplices in *material particulars* in the sense in which that expression is used in Section 114, illustration (*b*). The certificate of the Advocate-General appears to be wider in terms and raises the question of the admissibility of the former statements of the accomplices as coroborative of their testimony at the trial in any manner.

From the judgment of the majority of the Special Bench it appears to me to be clear that the former statements of the accomplice were admitted as corroboration within the meaning of Section 114, illustration (b) of the Indian Evidence Act. The learned Judges say, " In addition to the oral testimony of independent witnesses and the documentary evidence in the case, which will be considered later, the Crown relies on certain facts as corroboration of the evidence of the informers. Among these are the facts that certain statements were made by the approvers, Arumugam and Somasundaram, to Veeraraghava Aiyar, P. W. 31, and Inspector of Police attached to the Criminal Investigation Department, statements which were substantially in accordance with the evidence before this Court......It was contended that the evidence as to the making of these statements was not admissible, and that, if it was, it did not corroborate the evidence of Arumugam given at the trial." The reference to be oral testimony of independent witnesses and the documentary evidence in the case is certainly made as corroborative evidence within the meaning of illustration (b) to Section 114 and I have no doubt that the learned Judges treated the previous statements of the approvers also as corroborative evidence according to that Section. I cannot therefore agree with the contention of Mr. Napier that the judgment does not show that the learned Judges treated the previous statements in question as supplying corroboration within the meaning of section 114, illustration (b). Putting aside for the moment the question whether Veeraraghava Aiyar was an authority legally competent to investigate the fact, Section 157 of the Indian Evidence Act certainly enacts a general rule that the former statement of a witness may be proved in order to corroborate his testimony. No exception is expressly made of the testimony of a witness who is an accomplice. The question is whether Section 157 should not be taken with reference to its scope

to be qualified by illustration (b) Section 114. According to ordinary canons of interpretation, I think it must be taken to be so qualified, the rule in Section 157 being a general provision with regard to the corroboration of the testimony of a witness and illustration (b) to Section 114 being a special rule as to the testimony of an accomplice. If, therefore, that illustration means that an accomplice should be corroborated by independent evidence of the facts spoken to by an accomplice, it follows, in my opinion, that a previous statement of the accomplice, assuming it for the moment to be admissible in evidence at all under Section 157, (a question which I shall presently consider) cannot be admitted as corroboration of the accomplice within the meaning of illustration (b) to Section 114. On this point it is proper to consider in what sense the expression "corroboration in material particulars" was understood prior to the enactment of the Indian Evidence Act. Mr. Napier does not deny that such an enquiry is proper. Section 114 itself states that, if three accomplices between whom there was no opportunity of previous concert corroborate each other, that would be a circumstance which would justify the conclusion that the accomplice is not unworthy of credit in the particular case. But the previous statement of the same accomplice witnesses is not referred to as corroboration of the testimony given by him at the trial, though under the previous Evidence Act II of 1855 the general rule with regard to the admissibility of a previous statement of a witness to corroborate his testimony was the same as under the present Act. There is no decided case which has treated the previous statement of an accomplice as affording corroboration of his testimony within the meaning of illustration (b) to Section 114. On the other hand, in *Reg.* v. *Malapabin Kapana*,[1] *Queen. Empress* v. *Bepin Biswas*[2] the contrary view was held. Section 157 was considered in both the cases. In the former case, the learned judges who decided it held that the previous statement of an accomplice "can scarcely be said to answer the the purpose for which juries are advised by judges to require the evidence of an accomplice to be confirmed. From the position in which he stands it is considered unsafe to act upon his evidence alone. Hence the rule requiring confirmation of it as to the prisoners by some independent, reliable evidence. But his statement, whether made at the trial and in whatever shape it comes before the court, is still only the statement of an accomplice, and does not at all improve in value by repetition. The force of any corroboration by means of previous statements must evidently depend upon

1. (1874) 11 Bom. H. C. R. 196. 2. (1884) I. L. R. 10 C. 970.

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the truth of the proposition that he who is consistent deserves to be believed. If that proposition be not universally true, what becomes of the virtue of previous consistent statements ? One may persistently adhere to falsehood once uttered, if there is a motive for it." It may no doubt be said, with reference to the observation that the statement of an accomplice does not improve by repetition, that the previous statement in addition to proving the consistency of the witness might be of value if it was made before any pardon was tendered to the accomplice as it might weaken the suspicion attached to his testimony as being given under the temptation created by the offer of a conditional pardon. But it can hardly be said that the infirmity attaching to his evidence is thereby satisfactorily removed. In the latter case, Princep and Macpherson, JJ. observed, "The mere repetition of the same statement of facts without contradiction or material discrepancy is, no doubt, recognised by Section 157 of the Evidence Act, as some corroboration of the truthfulness of that statement, but the judge has lost sight of the fact that, from the position occupied by an approver witness his evidence is necessarily regarded with very great suspicion as, being tainted, and that although he may, on the main facts connected with the commission of the offence, be truthful and reliable, it is when he comes to implicate any particular person that his evidence should be accepted with the greatest caution." The learned Judges express their approval of the decision in *Queen-Empress* v. *Nawab Jan*,[1] that the corroborative testimony should be that of an independent witness of facts which show the connection of the accused with the commission of the offence with which he is charged. In *Abdul Karim* v. *King Emperor*,[2] it was held that the corroboration must be independent of the accomplice or of a co-confessing prisoner. But the question did not relate to the admissibility of previous statements of an accomplice as corroboration either in that case or in some other cases where similar opinions were expressed. In the judgment of Abdur Rahim, J. in *Vyasa Row* v. *King-Emperor*,[3] the previous statement is stated to be not proper corroboration of an accomplice ; see page 332. According to English law, previous statements of a witness are not generally receivable in evidence for corroborating his testimony. But such statements seem to be admitted where a witness is charged with a design to misrepresent in consequence of some motive or friendship, the previous statement being used in such a case to show that he made a similar statement before such motive existed; and also

1. (1868) 8 W. R. C. R. 19. 2. (1904) 1 A. L. J. 110.
3. (1911) M. W. N. Vol. I, 327.

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where the witnesses is charged with having recently fabricated the story. But the previous statement, it is stated, is admissible in these cases, not to prove the truth of the facts stated, but merely, to show that the witness is consistent with himself. See *The Queen* v. *Coll*[1]; Previous statements are also admissible on charges of rape and similar offences against females. The fact that prosecutrix made a complaint very shortly after the outrage, together with the particulars of the statement, is admissible to confirm her testimony and disprove consent. In *The Queen v. Lillymen*,[2] the Court of Crown Cases Reserved held that a previous statement is admitted in such a case, not as being evidence of the facts complained of but as evidence of the consistency of the conduct of the prosecutrix with the stroy told by her in the witness-box and as negativing consent on her part. Hawkins, J. in *Rex* v. *Clarke*,[3] said, " He only ruled, and in our opinion he correctly ruled, that they were not evidence of the truth of her complaint or of the statements of fact on which it was based. See also *Rex* v. *Osborne*.[4] The admission in evidence of a previous statement is strictly limited to the class of cases mentioned above. It appears to be settled that it is not admissible in an action for assault by performing a surgical operation, *Beatty* v. *Cullingworth*.[5] It is remarkable that there is really not a single case where the previous statement of an accomplice was admitted as corroborative to prove the consistency of the accomplice or for any other limited purpose or to prove that his story was not recently concocted although an accomplice would be seldom called upon to give evidence at the trial without having made a previous statement about the facts.

It was held by the courts in England before the enactment of the Indian Evidence Act that the accomplice should be corroborated by independent evidence as to the person of the prisoner against whom he speaks. See *Rex* v. *Addis*,[6] *Rex* v. *Webb*,[7] *Rex* v. *Wilkes*,[8] *Reg* v. *Farler*,[9] *The Queen* v. *Stubbs*.[10] And the corroboration of the evidence of one accomplice by that of another without the testimony of untainted witnesses was also regarded as insufficient in law, *Rex* v. *Nookes*.[11] See Archbald's Criminal Pleadings, Evidence and Practice, 23rd Edition, page 391. It is perhaps doubtful whether this last rule about the corroboration of an accomplice by

1. 24 L. R. Ir. 322.
2. (1896) 2 Q. B. 167.
3. (1818) 2 Stark. 241.
4. (1905) 1 K. B. 551.
5. (1896) 60 J. P. 740.
6. (1834) 6 C. and P. 388.
7. (1834) 6 C. and P. 595.
8. (1835) 7 C. and P. 272.
9. (1837) 8 C. and P. 106.
10. (1855) 25 L. J. M. C. 16.
11. (1833) 5 C. and P. 326.

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other accomplices can be held to be applicable in India having regard to the explanation to illustration (*b*) to Section 114 already referred to above. But the evidence of another accomplice is still independent evidence although it is that of a tainted witness. It cannot be said that a previous statement of the same accomplice stands on the same footing. If, admissible, it may possibly deserve considerable weight in particular cases, but the question whether it should be admitted must be settled by considerations applicable to the large majority of cases. In *Elahee Buksh's* case,[1] Sir Barnes Peacock treated the law in this country on the question of corroboration as generally identical with the English law. It is hardly likely that the Indian Evidence Act intended to depart from the English law as to the nature of the corroborative evidence required. In *The Queen* v. *Mohesh Biswas*,[2] decided immediately after the passing of the Indian Evidence Act, Phear and Ainslie, JJ. held that independent evidence of corroboration was necessary. Mr. Napier placed much reliance on *R.* v. *Ellsom*[3]; where Darling, J. observed that the previous statement of one of the witnesses in the case, if in accordance with his testimony at the trial, would be strong corroboration of his evidence. The witness however was not an accomplice but an accessory after the fact. His evidence no doubt was regarded as tainted. But the corroboration desirable of the testimony of *all* tainted witnesses cannot be placed on the same footing.

In *Ramasami Gounden* v. *Emperor*,[4] Subrahmania Aiyar, J. dealing with the evidence of a witness who assisted in the removal of the dead body from the place of murder to the pit in which it was buried, observed, "But this being all the complicity that can be attributed to him, it seems to me that that could not make his evidence against the accused that of an accomplice: for though the witness might be indictable under Section 201 of the Indian Penal Code for the concealment of the body, yet such offence on the witness's part being one perfectly independent of the murder, the witness could not rightly be held to be either a guilty associate with the accused in the crime of murder or liable to be indicted with him jointly. The learned judge refers to the observations of Baron Martin in *Rex* v. *Boyes*,[5] where that learned judge distinguishes between the evidence of accessories properly so-called and that of other witnesses whose evidence might also be regarded as tainted. Bashyam Aiyangar, J. concurred in the observations

1. (1866) 5 W. R. C. R. 80.
2. (1873) 19 W. R. C. R. 16.
3. (1912) 76 J. P. 38.
4. (1903) I. L. R. 27 M. 271.
5. (1861) 9 Cox. C. C. 32.

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of Subrahmania Aiyar, J. He observed that there was no authority whatever in English law which warrants the extension of the maxim that the testimony of an accomplice should be corroborated in material particulars to witnesses who are not accomplices in the proper sense of the word. He said "I do not think it will be in furtherance of justice to regard another class of witnesses as *quasi* accomplices and to extend the maxim to them."

I cannot therefore regard *R* v. *Ellsom*,[1] as authority for the position that the previous statement of an accomplice would be regarded in England as evidence corroborative of his testimony in material particulars. On the other hand, in *R* v. *Dimes*,[2] where the evidence of corroboration of an accomplice who had made a previous statement was referred to, no reference was made by the same learned judge, Darling, J. to his previous statement as furnishing corroboration of his evidence at the trial.

Mr. Napier contends that the question "what is corroboration in material particulars" is entirely a question of fact and must depend on the circumstances of each case. This proposition is undoubtedly in one sense quite true, but requires explanation. A question may be one of fact, but there may be a rule that a certain class of evidence, is required to prove it, or that a certain class of evidence is not admissible to prove it. Or again some particular kind of evidence, though admissible, might be regarded as legally insufficient. The evidence of a co-accomplice belongs to the last class. A previous statement of the same accomplice would belong to the second class. The necessity of corroboration connecting the accused with the offence belongs to the first class. Subject to these rules of law with regard to evidence, the question whether the evidence of an accomplice has been properly corroborated is no doubt one of fact. The cases cited by Mr. Napier do not in my opinion substantiate his contention that there are no legal rules at all governing the question of corroboration of an accomplice. *In re Meunier*,[3] merely laid down that the question whether there was sufficient corroboration to prove a *prima facie* case justifying the extradition of the accused was one of fact for the magistrate. There was no question raised as to the kind of evidence legally necessary for corroboration. The court found that there was a good deal of corroborative evidence adduced by the prosecution *Rex* v. *Boyes*,[4] and *Reg.* v. *Gallagher*,[5] are only authorities for the position that a conviction without corroborative evidence is not

1. (1912) 76 J. P. 38.
2. (1912) 76 J. P. 47.
3. (1894) 2 Q. B. 415.
4. (1861) 9 Cox. C. C. 32.
5. (1883) 15 Cox. C. C. 291.

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illegal. *Rex Tate*,[1] has no bearing on the question what kind of corroboration is legally required under the law. The only question as to the nature of the evidence necessary that we have to decide is whether independent evidence is not required. It is therefore unnecessary to discuss the question what other rules of law are applicable in determining whether there is proper corroborative evidence in any particular case. Section 114, illustration (b) seems to a large extent to have been based on the views propounded by Sir Barnes Peacock in *Elahee Buksh's* case. Subject to the possible exception with respect to the evidence of co-accomplices that learned judge accepted the English law as applicable to India and I think the Indian Evidence Act also did the same.

Mention must perhaps be made of the case of the *Queen-Empress* v. *Kunjan Menon*,[2] in which an application was made to the Privy Council for leave to appeal against the conviction of the accused, a Subordinate Judge, on the charge of abetment of bribery (Section 161 of the Indian Penal Code). The accused died before the application was disposed of. At the first hearing of the petition, there was some discussion as to the nature of the corroboration required of the evidence of an accomplice. Sir Richard Couch made an observation that the question was not one of pure law. The question however was not further discussed, as Mr. Mayne then urged that there was no legal evidence of the bribery itself except the testimony of the accomplice. I do not think that the observation of Sir Richard Couch can be regarded as indicating that that learned judge was of opinion that the question whether any class of evidence was admissible as corroboration would always be one of fact.

I am of opinion therefore that the previous statement of an accomplice cannot legally amount to corroboration within the meaning of illustration (*b*) to Section 114 of the Indian Evidence Act. The question whether it is admissible at all as corroborative evidence under Section 157 for any other purpose is not free from doubt. It is possible to hold that it is admissible for proving his consistency and as disproving a suggestion that it was recently concocted by him. But I am inclined to think that it would be dangerous to admit it even for this limited purpose of proving his consistency. To do so would lead to the danger of its being relied on to prove the truth of the evidence also. This is likely to defeat the object of the rule requiring independent evidence of corroboration. The safer rule in my opinion would be to hold

1. (1908) 2 K. B. 680.
2. (1891) 1 M. L. J. 397.

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that section 114, illustration (b) requires the rejection of the previous statement altogether. It is however not necessary to decide this point here. I am clear that at any rate it cannot be relied on as corroborative evidence of the truth of the statements made by him at the trial. I am of opinion that the majority of the Special Bench committed an error of law in admitting the statements of the approver witnesses to P. W. 31 under section 161, Criminal Procedure Code, and to Mr. Cox under section 164, Criminal Procedure Code, as corroboration within the meaning of illustration (b) to section 114 of the Indian Evidence Act.

The third point :—

The third point raised in the certificate of the Advocate-General is whether the previous statements of P. W. 6 and P. W. 12 to P. W. 31 were made to an authority legally competent to investigate the facts within the meaning of section 157 of the Indian Evidence Act, *i.e.*, whether Veeraraghava Aiyar, P. W. 31, was legally competent to investigate the facts of which evidence was given at the trial by P. W. 6. and P, W. 12, that is, the existence of a conspiracy between the accused in the case and others within the meaning of Section 121 A of the Indian Penal Code. This objection, it is stated, was not specifically taken on behalf of the accused while Veeraraghava Aiyar was being examined as a witness by the prosecution but only at the time of the arguments. Mr. Napier asks us on this ground to refuse to deal with the objection, but he admits that no objection was raised to the consideration of the point by the Special Bench when it was raised by the accused. It was for the Special Bench to consider whether the objection should be entertained at a later stage of the case or not. The learned Judges allowed it to be raised and dealt with it in their judgments. We cannot hold that the accused are not entitled to have the question decided. P. W. 31 was as a matter of fact cross-examined by the accused at considerable length with a view to show that he had no authority to investigate the facts in question. At the same time the evidence on the record relating to the question is meagre and the facts have not been placed beyond dispute so as to enable us to deal with the point satisfactorily. The prosecution was bound to prove the facts necessary to show that Veeraraghava Aiyar's testimony as to the previous statements made to him by P. W. 6 and P. W. 12 would come within the purview of Section 157 of the Indian Evidence Act. The section requires that the previous statements should have been made "before any authority legally competent to investigate the fact.". The expression '*investigate*' is not defined in the Indian

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Evidence Act. The ordinary meaning of the word is to 'enquire into.' It is defined in the present Criminal Procedure Code; and chapter 14 of the Code is headed "Information to the police and their powers to *investigate.*" The corresponding chapter in the Criminal Procedure Code of 1861 (Act XXV) was headed "Preliminary *enquiry* by the police." The investigation referred to in Section 157 of the Indian Evidence Act is not however confined to investigation in criminal cases under the provisions of the Criminal Procedure Code. The prosecution may be justified in contending that the word should not be interpreted in the technical sense that it bears in the Criminal Procedure Code. Understanding it in the broad sense of 'making enquiry into', the section requires that the statement should have been made before an *authority legally competent* to inquire into the fact. '*Legally competent*' must, I think, mean, having power under some law, statutory or otherwise.' The power need not be derived from an *express provision* of the law, as stated by the majority of the Special Bench, if by that expression be meant 'some definite statutory enactment,' but it must be shown that there is power under some law or other to investigate. The words '*authority*' and '*competent*' support this view. The prosecution had therefore to prove that P. W. 31 was empowered by some law to enquire into the conspiracy. Mr. Napier has tried to show this in two ways. He relies first on section 21 of the Police Act, XXIV of 1859, which provides as follows;—"Every Police officer shall, for all purposes in this Act, be considered to be always on duty and shall have the powers of a police officer in every part of general police district. It shall be his duty to use his best endeavours to prevent all crimes, offences, and public nuisances; to preserve the peace; to apprehend disorderly and suspicious characters; to detect and bring offenders to justice etc.' Reliance is placed on the fact that it is the duty of a police officer 'to detect and bring offenders to justice.' The expression 'general police district,' would embrace, under the definition given in the Act, the whole Presidency. The section, it is contended, invests every police officer with the powers of a police officer in every part of the Presidency. These powers are defined in sections 22 to 43 of the Act. But these sections were repealed by Act XVII of 1862; and the powers of a police officer are now regulated by the Criminal Procedure Code. The Act therefore cannot be relied on to show that a police officer has any specific powers. But it is contended that as section 21 is still in force which makes it the duty of a police officer 'to detect and bring offenders to justice' he must be taken to have all powers necessary for

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the purpose and therefore to investigate offences, and that every police officer has these powers throughout the Presidency. I am entirely unable to accept this argument as sound. A law making it a person's duty to use his best endeavours 'to detect and bring offenders to justice' would not by itself give him any power which he could exercise over other persons. The 'endeavours' must be made by him means of powers given to him by the law. Some endeavours to detect and bring offenders to justice might no doubt be made by every citizen. If a police officer wishes to do anything more requiring the exercise of power over individuals, he must get the authority to do so from some law giving him the power. Act XXIV of 1859 accordingly did confer various powers on police officers, but those Sections have been repealed. The result is that they must now discharge their duties under the powers given to them by the Criminal Procedure Code or by some other law. It is quite impossible to hold that the mere imposition of duties of a comprehensive nature would authorise a person on whom they are imposed to restrain the rights and liberties of individuals or to exercise any specific powers over them. The case would be different where a statute commands a person to do a particular act, as such a command would be sufficient authority for him to do it even though it may affect other persons. The learned Judges who formed the majority of the Special Bench do not rest their judgment on Section 21 of the Police Act. I must hold that P. W. 31 was not empowered by that section to investigate *the fact* in question in this case.

Mr. Napier then argues that part from Section 21 of Act XXIV of 1859, P. W. 31 had authority to investigate. The witness was an Inspector of the Criminal Investigation Department. It is urged that in that capacity he was competent to make the investigation. This argument is put in two ways. An officer in charge of a police station has the power to investigate cognizable cases which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try; and Section 551 of the Code of Criminal Procedure gives the power of investigation to police officers superior in rank to an officer in charge of a police station in cases throughout the local area to which they have been appointed. It is contended that P. W. 31 obtained his competency under Section 551. Very little information has been placed before the court on this point. It would appear from G. O. No. 913, Judicial, dated 2nd July 1908, that the officers of the Criminal Investigation Department are placed under the control of the Deputy Inspector

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General of police, C. I. D. It is stated that the Deputy Inspector-General of Police "should have free discretion in sending his agents" (*i. e.* the C. I. D. officers) when and where he chooses " but that he should, except in the case of following up some special crime, promptly inform the District Magistrate and the District Superintendent of Police of the enquiries he is making in the district and should keep them fully informed of the progress of his *investigation.*" It is contended that having regard to this provision in the G. O., whenever the Dy. Inspector General of the C. I. D. sends out any of his agents to any local area, such an agent, if superior in rank to an officer in charge of a police station, is competent to investigate crimes within that area. The functions of the C. I. D. are described in the G. O. to be " generally speaking, to *watch* widespread and dangerous movements, *to collect and disseminate information* regarding organised crimes and gangs and to *assist in the investigation of crimes* which are of such a special nature that the local officers are unable to deal with them adequately without help." So far as investigation of crimes is concerned, their function is stated to be to *assist in the investigation* in case where the local officers require help. It is not stated that they are themselves to be investigating officers. Probably the object was to maintain the responsibilities and powers of the local officers as stated in paragraph 3 of the G. O. and to make the C. I. D. officers merely their assistants. The reference to enquiries and investigations of the C. I. D. officers in paragraph 3 cannot therefore be assumed to import that they are themselves to be investigating officers. At any rate, a mere reference to investigations to be made by them can at best show only that the G. O. contemplates the possibility of the investigations being made by them and cannot dispense with proof of the fact that any particular officer was appointed to a certain local area within the meaning of Section 551 of the Criminal Procedure Code. The act of the Deputy Inspector General of the C. I. D. in sending out an officer superior in rank to a station-house officer to a certain district or place cannot be regarded as tantamount to an appointment of that officer to a definite local area. No evidence has been adduced in this case that P. W. 31 was appointed to any local area by competent authority within the meaning of Section 551. The majority of the Special Bench observe that " as a member of the provincial C. I. D., his (*i. e.* P. W. 31's) local area is the Presidency of Madras." The learned Judges go on to say that the absence (if it be a fact) of a formal order of appointment is immaterial. With all deference, I am unable to accept this view. It assumes that

all officers of the C, I. D. are appointed to the whole Presidency within the meaning of Section 551 simply because they are members of the C. I. D. It assumes that every officer superior in rank to an officer in charge of a police station must be deemed as appointed to some certain local area. I cannot but regard this assumption as unfounded. The contention on behalf of the accused is that the C. I. D. officers are really a number of men at the disposal of the police department available for being deputed to do special duties. This view is quite as likely as that accepted by the learned Judges. It was for the prosecution to show that P. W. 31 was competent to investigate and I am constrained to hold that it failed to do so. P. W. 31 when examined as a witness did not state that he was appointed to any local area. He merely said that he was ordered to search the houses of P. W. 6 and P. W. 12. He says he inferred from that fact that he had powers of investigation. Surely his inference was entirely unwarranted. Mr. Thomas, his superior officer, also did not say that he was appointed to any local area (under section 551). The majority of the Special Bench observe that P. W. 31 was sent to Tuticorin for the specific purpose of making certain searches. Search parties were sent out and P. W.31 belonged to one of the parties. From this specific evidence, I find it impossible to draw the inference that the party and all the members of it were appointed as investigating officers, assuming that an appointment to investigate a specific crime could be made by the Inspector-General of Police or by the Deputy Inspector-General.

There is again another difficulty which the prosecution has to overcome. The facts deposed to by P. W. 6 and P. W. 12 at the trial related to the existence of a conspiracy under Section 121 A of the Indian Penal Code; an offence under that section is not a cognisable one and a police officer has no power under Sections 157 and 551, Criminal Procedure Code to investigate such an offence without the orders of a magistrate in that behalf. See Section 155. The search parties were sent out to investigate the offence of the murder of Mr. Ashe, Collector of Tinnevelly. This would not, it is contended, empower any one to investigate a different offence, a non-cognisable one without the magistrate's order. It is admitted that in this case there was no such order of a magistrate. But taking it that P. W. 31 had no power under the Criminal Procedure Code to investigate the offence of conspiracy under Section 121 A of the Indian Penal Code, the question arises, whether, if he had authority to investigate the murder of Mr. Ashe, he had not power to investigate facts which

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might have a connection with the murder; not as disclosing another non-cognisable offence, but as facts which might have a possible bearing on the murder. I think it is possible to hold that he had such power. But as I have held that the prosecution failed to show that P. W. 31 had legal power to investigate any facts, this objection to the admissibility of the statements of P. W. 16 and P. W. 12 must be upheld, and I abstain from deciding the question whether the absence of a magisterial order is an insuperable objection. I have considered this objection to the reception of the former statements of P. W. 6 and P. W. 12 anxiously on the ground that P. W. 31 was not an authority competent to investigate the facts, and I am obliged to come to the conclusion that the objection must be upheld. It is possible that all the evidence available on the point was not adduced but the objection having been allowed to be entertained by the Special Bench, a decision has to be arrived on the evidence on record.

The fourth point:—

The fourth point raised by the Advocate-General is whether the statements made by P. W. 6 and P. W. 12 to Veeraraghava Aiyar, P. W. 31, were not rendered inadmissible in evidence by reason of the provisions of section 25 of the Evidence Act. It is a course conceded for the prosecution that in those statements P. W. 6 and P. W. 12 admitted they themselves were guilty of the offence under section 121 A of the Indian Penal Code charged against the accused in the case. The question is whether they are in admissible against the accused on the ground that they are confessions made to a police officer, P. W. 31. The finding of the majority of the Special Bench is that section 25 makes a confession to a police officer inadmissible only against the person making it, and that the statements are therefore admissible against the accused under Section 157. The learned Judges are of opinion that the mischief aimed at is the same in Section 26 relating to a confession made by a person in police custody as in section 25 and as section 26 makes the confession under that section inadmissible only against the person making it, the expression in section 25 "against a person accused of any offence" must also be held to mean "against the person making the confession," The argument for the prosecution at the hearing before us is briefly as follows. Sections 24 to 27 must be taken to lay down rules of admissibility only with regard to a confession made by a person charged with an offence at the trial. One reason for so holding is stated to be that a confession is generally admissible only against the person

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making it though the legislature has made an exception by making it admissible also against a person who is being tried jointly with such person when the confession has been already put in evidence against the maker. The soundness of this latter proposition is unquestioned. [A confession could be used only against the accused in England—See Taylor on Evidence, X Edition, Section 904. Phipson on Evidence, page 246, IV Edition. That was also the law in this country until the Indian Evidence Act of 1872 was passed].

But what inference follows from this proposition? The accused in this case were not tried jointly with P. W. 6 and P. W. 12. Therefore the confessions of the latter should not be admissible against them. The reason given for the argument seems to me effectually to destory the argument. It comes to this:—Because a confession is admissible only against the person making it, or one who is jointly tried with him, therefore, under Section 25, the confessions of P. W. 6 and P. W. 12 were admissible against the accused who were *not* jointly tried with them—an apparently absurd conclusion. But it is contended that there is no such absurdity because apart from this reason the word *confession* has a well understood meaning, *viz.*, an admission of guilt by a party to the criminal proceeding before the court, and therefore the previous statements of P. W. 6 and P. W. 12 who were not such parties were not confessions at all. This is not the reason given by the Special Bench for admitting the statements. The learned Judges treat them as admissions but say that Section 25 does not prevent their reception as evidence against the accused. This argument does not appear to have been urged before the learned Judges so far as their judgments show. I shall presently examine this argument as to the meaning of the word, but it is well to realise the effect of it. It amounts to this:—An admission of guilt to a police officer by a party to the proceeding cannot be proved against another accused person unless both are being jointly tried; but an admission of guilt by one who is not a party to the proceeding may be proved against such a person. *Prima facie* this contravenes the principle that an admission of guilt is admissible only against the person making it or one tried for an offence jointly with him. I cannot help thinking that the argument at the back of this contention, though it was not put forward directly in so many words, is that Sections 24 to 26 make an admission of guilt inadmissible only as substantive evidence. But can it be held that it may be used for corroborating the testimony of a witness as a previous statement made by him? I am clearly of opinion that

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it cannot. In the first place, the language of the section is too clear to admit of such interpretation. It says (as also does Section 25) that the confession cannot be *proved*. If it cannot be proved, how can it be admitted in evidence for any purpose? Secondly, when it is intended that anything not admissible under one section of the Act is not to be excluded if it be relevant under some other section, the Act has expressly taken care to say so. Thus Section 21 while enacting that an admission cannot be proved by, or on behalf of, the person making it, states in exception (3) that it may be proved 'if it is relevant otherwise than as an admission.' Section 43 provides that "Judgments, orders or decrees, other than those mentioned in Sections 40, 41 and 42 are irrelevant *unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.*" Similarly Section 8, explanation I says that a statement of a party to a proceeding not admissible under that section 'is not to affect the relevancy of statements under any other section of the Act.' But Section 25 does not say that an admission of guilt not admissible under that section may be admitted under any other section. Thirdly, the reason why a confession made to a police officer should not be admissible is to my mind equally applicable whether it is to be used as substantive evidence or for the purpose of corroboration.

I must now examine the main argument for the prosecution that the word *confession* means an admission of guilt by a party to the proceeding before the court.

In Section 148 of the Criminal Procedure Code of 1861 which contained the rule of evidence afterwards embodied in the Indian Evidence Act of 1872, the provisions were exactly the same as in Section 25 except that the phrase 'or admission of guilt' was used after the word 'confession.' The omission of the phrase was, I think, due to its being considered unnecessary as it merely conveyed the well-known meaning of the word 'confession' and not to any change of intention on the part of the legislature as to the sense in which the word should be understood. Any such change would have been clearly indicated by means of a definition. The section certainly did not show that an 'admission of guilt' to constitute a confession, should be by a party to the proceeding before court. The Century Dictionary states that at Common Law 'a confession' means 'an acknowledgment of guilt.' The same explanation is given in 'Field on Evidence,' see page 83. In Bouvier's Law Dictionary, the following explanation is given :—(1) 'the voluntary

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declaration made by a person who has committed a crime or misdemeanour to another, of the agency or participation which he had in the same; (2) an admission or acknowledgment by a person, when arrigned for an offence, that he committed the crime with which he is charged.' It will be observed that an extra-judicial confession does not connote according to this definition that the statement was made by a party to the trial before the court. According to American Cyclopædia of Law and Procedure, Volume VII, a confession in criminal law is ' the voluntary declaration by a person, who has committed a crime or misdemeanour to another, of the agency or participation he had in the same: an acknowledgment of guilt; the acknowledgment of a crime or fraud.' No doubt a confession is used in evidence only against a person charged with a crime in the case before the court and only against a person making it or a co-accused, but this does not justify the view that the word *confession* itself means an admission of guilt by such a person. In *Queen-Empress*, v. *Jagrup*,[1] ' where the question was whether an inculpatory admission which falls short of an admission of guilt would amount to a confession, Stephen's Digest of Evidence was cited where that learned author defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime.' Straight, J, was asked, on the authority of that definition, to hold that an admission need not amount to a complete admission of guilt. While holding that there was nothing in the definition against his view that an admission which does amount to an acknowledgment of the commission of a crime is not a confession, the learned Judge deprecated the use of a definition adopted for the purpose of an intended code in England as a guidance in construing the Indian Evidence Act. The definition is relied on by Mr. Napier to show that an admission to be a confession, must be a statement ' by a person charged with a crime.' I do not think that the learned author means by that expression ' charged in the proceeding before court' but 'charged with a crime' (that is) ' accused of a crime ' 'at the time of the admission.' But assuming that he used the expression in the former sense, I agree with Straight, J. that the author's definition is of little use in construing the Indian Evidence Act. Our attention was drawn to Mahmood, J's citation of Stephen's definition in *Queen-Empress* v. *Babu Lal*,[2] but the definition is referred to only for the purpose of considering the question whether a confession should be a complete admission of guilt or not.

1. (1885) I. L. R. 7 A. 646. 2. (1884) I. L. R. 6 A. 509 at p. 539.

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I cannot but think that if a confession was intended to refer only to an admission made by a party to the proceeding before the court, the legislature would have said so. Moreover, there would be much redundancy in the language of Sections 24 and 25 if we adopt the meaning contended for by the prosecution. The reference in Section 25 'to a person accused of an offence' would be unnecessary as the word confession, by itself imports, according to the contention, a statement by the accused before the court. Similarly the expression 'in a criminal proceeding' would be unnecessary in Section 24.

Apart from the fact that the Act does not say that a confession is a statement by a party to the trial before the court, I think it makes it clear that it need not be made by such a person. Section 24 renders irrelevant in certain cases 'a confession made by *an accused* person.' Section 25 makes certain confessions *inadmissible* against a person accused of any offence The person accused of an offence in Section 25 refers of course to a party to the proceeding before the court against whom the confession is sought to be used. But what is the meaning of the expression 'made by *an accused* person' in Section 24? Does it mean made by a person accused *in the proceeding before the court*? I think not. The meaning is in my opinion that the person must be 'an accused person' at the time of the confession. This was the meaning put on the expression in *Empress* v. *Jadab Das,*[1] where the court held that a person making an admission may be 'an accused person' though he might not be under arrest at the time. No doubt the accused person making the admission would also ordinarily be a party to the proceeding before the court; but it cannot be inferred from that fact that the accused person making the confession should be the accused in the proceeding before the court. What Section 24 therefore requires is that the admission should be by a person then accused of a crime not that he should be the accused before the court. Moreover the words 'by an accused person' would be a mere surplusage, if a confession is always a statement made by the accused in the case. The expression '*made by* an accused person' means by one then an accused person just as '*proving against* a person accused of an offence' means 'proving against one who is then an accused person.' It must be remembered that confessions coming under Sections 25 and 26, in order to be excluded, need not have been made by an accused person at all as those words are omitted in the sections. It was regarded apparently that it was necessary to shut out all admission

1. (1899) 4 C. W. N. 129.

of guilt made to a police officer whether the person making it was then accused of an offence or not. I am therefore of opinion that the word confession does not import that the admission of guilt should be by a party to the criminal proceeding before the court.

Thus far I have dealt with the arguments on behalf of the prosecution. An examination of the sections leaves no doubt in my mind that an admission of guilt made to a police officer *by any person* cannot be proved as against *any person accused* of any offence whether he be the person who made the admission or not. Under Section 24 a statement which appears to the Court to have been caused by an inducement, threat or promise, is inadmissible both against the person making it and against others such as his co-accused. A confession which was not voluntary within the meaning of Section 24 cannot be used against a co-accused while it is inadmissible against the person making it. This is really not denied, but it is argued by Mr. Napier that the exclusion is not directed by the words of Section 24, but by the provisions of Section 30. He contends that the language 'when a confession is proved' in that section means 'when it is admitted in evidence.' I do not think so. That is not the ordinary meaning of 'proved.' A statement is proved when it is shown to the satisfaction of the Court that it was made. If the statement is in writing, the writing is proved in the manner in which the execution and contents of documents are required to be proved by the subsequent sections of the Act. Such proof does not include showing that the statement was not made owing to any threat of promise or inducement. It could not mean this, because the onus of proving this would not be on the prosecution but on the accused against whom it is sought to be used. Sections 24 and 30 show that the Act makes a clear distinction between the proof of a confession and its relevancy. See also the definition of the word 'proved' in Section 4. I must hold that so far as Section 30 goes, when a confession is proved, it is admissible under the section against a co-accused also. It is by means of Section 24 that a confession which is an improper one is excluded both against the person making it and against others. If this conclusion is right, it affords a strong argument in favour of holding that under Section 25 also the confession is inadmissible against any accused person and not merely against the maker of the confession. For my part, I require no such support from Section 24. The words are perfectly clear. The mischief of the section clearly extends to the admissibility of the confession against all persons. The one and only argument adduced against this plain construction is that Section 26 makes a confession made not to

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a police officer but by a person in police custody inadmissible only against him and not against others, and it is urged that there is no sufficient reason for not excluding it against others also if a statement made to a police officer is excluded against others. It may be that the legislature thought the probable extent of police pressure in the one case was likely to be less than in the other and that the fact of the maker of the statement being in police custody did not require its being excluded against others. I do not say this reason is convincing but this is not the only case where a court is unable to find convincing reasons for distinctions made by the legislature. I am bound to attach more importance to the fact that very different language has been used by the legislature in two consecutive sections; there is no difficulty in finding a reason for the comprehensive language used in Section 25. I have no hesitation in arriving at the conclusion that the statements of P.W. 6 and P.W. 12 to 31 are inadmissible in evidence. My opinion is in accordance with the view taken by the Bombay High Court in *Emperor* v. *Harisingh*,[1] I agree with Batchelor, J. that a confession which is inadmissible against the person making it is *a fortiori* inadmissible against another person implicated by it. *Queen-Empress* v. *Tribhovan Manekchand*,[2] was cited by Mr. Napier in support of his contention. The question admittedly did not arise for decision in that case. The question was whether a confessional statement was admissible against the maker in an inquiry under Section 523, Criminal Procedure Code as to whom certain stolen property should be returned. The court held that the word confession has reference only to criminal proceedings, that Section 25 excluded the use of the statement in question in that case only in such proceedings and that the statement was receivable in evidence as an admission in the enquiry made by the court as to the person entitled to the return of the property. Reliance is placed on the observation of West, J. that 'confession' in Section 25 as in Section 24 means "a confession made by an accused person, which it is proposed to prove against him to establish an offence." No doubt, a confession would generally be made by an accused person and would be generally also used against him. The point made by the learned Judge was that Section 25 did not refer to the use of a confession in other than a criminal proceeding. I do not think he addressed himself to the question whether a confession should always be a statement by a party to the proceeding.

Our attention was drawn to the state of the law on the point before the enactment of the Indian Evidence Act. That law was

1. (1910) 12 Bom. L. R. 899. 2. (1884) I. L. R. 9 B. 131.

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contained in Sections 148 and 149 of the Code of Criminal Procedure of 1861, which are in substantially the same terms as Sections 25 and 26 of the Indian Evidence Act. They throw no useful light on the point. We are moreover bound to construe the sections in the Indian Evidence Act which is a complete code according to the plain meaning of the words, without reference to the previous law on the subject. It has been suggested that any imperfection in the drafting of Sections 24 to 26 must be attributed to the fact that Sections 148 and 149 of the Criminal Procedure Code of 1861 were bodily imported into the Indian Evidence Act. But this does not help us, for there is the same obvious difference between the languages of Sections 148 and 149 of the Criminal Procedure Code. On the other hand the explanation of the word 'confession' in Section 149 is against the contention for the prosecution. Our attention was drawn to the facts that Jenkins, J. commented strongly against the prosecution in *Emperor* v. *Lalit Mohan Chuckerbutty*,[1] not producing the previous confessional statements made by certain approver witnesses to police officers and it is urged that the learned judge must have regarded them as admissible. The observations do not show that Jenkins, C. J. was of opinion that the statements in question could be put in by the prosecution as corroborative evidence. The accused were entitled under Section 162, Criminal Procedure Code, to ask the court to call for them and to give them copies (if the court thought fit to do so) to be used for cross-examining the approvers. The failure of the prosecution to produce them would be good cause for the strictures passed by the learned judge. The case does not help the prosecution. My conclusion is that the previous statements in question were inadmissible on account of the provisions of Section 25 of the Indian Evidence Act,

The fifth point:—

The fifth and last point raised in the certificate is the question whether the evidence of P. W. 31 of the previous statements made to him by P. W. 6 and P. W. 12 is inadmissible because the statements made by them to him were reduced to writing and the writing is declared to be inadmissible in evidence on behalf of the prosecution by Section 162 of the Criminal Procedure Code. I am clearly of opinion that the evidence of P. W. 31 is not inadmissible on this ground. Section 161 of the Criminal Procedure Code empowers an officer making an investigation under Chapter XIV of the Code to examine orally any person supposed to be acquainted with the facts and cricumstances of the case and makes it obliga-

1. (1911) I. L. R. 38 C. 559 at p. 582.

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tory on such person to answer questions put to him by the officer. Section 162 then enacts that "the statement made by any person if taken down in writing shall not be signed by the person making it, nor shall such writing be used as evidence." The language of Section 162 is too clear to my mind to justify the adoption of the argument that because the writing is declared inadmissible it must have been the intention of the legislature to shut out oral evidence also of the statement made to a police officer. Perhaps it is a sufficient answer to this argument to say that the legislature has not said so, but has deliberately restricted the inadmissibility to the writing. It is urged that the expression "such writing" is used in the section really to denote the statement made to the police officer which he is not prevented from taking down in writing. But why did not the legislature say "nor shall such *statement* be used as evidence" instead of using the word *writing*. Section 161 authorizes oral stetements being taken, and there is no provision in that section that such oral statement cannot be proved. If the oral statement, when not reduced to writing, may be proved, why should its being taken down in writing be a reason for making it inadmissible? It is not contended that in consequence of its being reduced to writing the oral statement would be inadmissible on account of any general rule of evidence. The statement is not one required to be reduced to writing and Section 91 of the Indian Evidence Act would not therefore prevent oral evidence of the statement being given. Oral evidence in such a case is not adduced to prove the contents of the writing. It is adduced to prove what statement the witness made to the police officer. It is contended that there could be no reason for allowing oral evidence to be adduced while the writing is excluded. But I think there was good reason for the legislature contenting itself with a provision that the writing should not be used. According to Section 35 of the Indian Evidence Act, the entry by a police officer in any record of statements made to him in the discharge of his official duty under Sections 161 and 162 of the Criminal Procedure Code would itself be relevant. The object of the legislature in Section 162 was, I think, to make an exception to the rule contained in Section 35 of the Indian Evidence Act in the case of statements made to police officers by persons examined by them at a preliminary investigation. It was apparently considered unsafe to assume that a police officer making an investigation would correctly record statements made to him. It is therefore provided that the statements should not be signed by the witness and should not be admissible in evidence. At the same time it was regarded

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as proper to make the police officer's record of such statements available to the accused at the judge's discretion for the purpose of cross-examining any witness called for the prosecution. Mr. Govindaraghava Aiyer attempted to show that the exclusion of the writing alone while admitting oral evidence would lead to hardship the accused in some cases. I do not consider it necessary to deal with them. I can easily conceive of cases where the admission of oral evidence would be a positive advantage to the accused. The non-exclusion of the written record might also lead to serious disadvantage to the accused. For instance, when it is desired to prove the statement made by a witness to the investigating officer, the prosecution might simply put in the written record without calling the officer. This it would be open to the prosecution to do according to Section 25 of the Indian Evidence Act. The result would be that the accused would be deprive of the opportunity of cross-examining the officer and proving that the statement of the witness was not correctly taken down by him. Mr. Govindaraghava Aiyar referred to *Isab Mandal* v. *Queen-Empress*,[1] as authority for the position that the police officer's record would not be admissible as evidence under section 35 of the Indian Evidence Act even apart from the exclusion. But with all deference to the learned judges who decided that case, I am unable to agree with them. The decision of the case was really rested on the ground that the record in question was not admissible under Section 162 of the Criminal Procedure Code. They go on to observe, " We are unable to see that Section 35 of the Indian Evidence Act has any application in the matter, for we do not consider that a document of this nature, which moreover is not necessarily a part of the official duty of a police officer to prepare at all, comes within the description of a '*record*' within the meaning of that Section." But Section 35 does not require that the record in question should be one which it is the duty of the public officer to make or prepare. It is quite sufficient that the entry is made by him *in the discharge* of his official duty. I am unable to entertain any doubt that a record made by an investigating officer of statements made to him by witnesses is one prepared in the discharge of his official duty. Clause 2 of Section 162 of the Code of Criminal Procedure provides that the record made by a police officer of a dying declaration shall not be inadmissible on account of anything contained in the Section. I am unable to see under what section of the Indian Evidence Act the record of dying declaration would be admissible except under Section 35. From the necessity of the case, the legislature considered it desirable to exclude

[1] (1901) I. L. R. 28 C. 348.

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dying declarations from the general rule making the police officer's record of statements inadmissible. *Fanindranath Banerjee* v. *Emperor*,[1] is a distinct authority against the contention of the accused. I agree with the opinion of the learned judges who decided that case, and with Karamat Husain, J. in *Rustom* v. *King-Emperor*,[2] that an examination of the corresponding sections in the previous codes of Criminal Procedure shows that the legislature deliberately restricted itself to making the writing alone inadmissible. Mr. Govindaraghava Aiyar relied on the observations of Beaman, J., in *Emperor* v. *Narayan Raghunath Patki*.[3] That learned judge draws his conclusions from the history of the legislation on the subject. He takes it that the object of the change in the present Procedure Code was merely to confer an advantage on the accused by making the written record made by a police officer of statements made to him available to the accused for cross-examination. But the learned judge can get over the alteration in the section in making the writing alone inadmissible in evidence, only by assuming that the word 'writing' is not used in the section in contradistinction to the word 'statement' used previously in it. This assumption is, I think not permissible. He points out that "as the law stands, the prosecution might have an advantage over the accused in some cases." But apart from this not being a sufficient reason for refusing to give effect to the plain words of the section, I can easily think of cases in which the adoption of a contrary view might result in disadvantage to the accused. I have no hesitation in concurring with the Special Bench in the view taken on the question by all the learned Judges who constituted the Bench.

The result of my findings is that, in my opinion, the statements of the approvers, Arumugam and Somasunduram, to P. W. 31 and to Mr. Cox ought not to have been admitted in evidence. With regard to the earlier statements I have entertained some doubt whether the majority of the Special Bench, have clearly stated that their conclusions from the evidence would be the same even if they were rejected, but I am not prepared to dissent from the view that such is in substance the effect of the judgment of the learned Judges. With regard to the statement to Mr. Cox, however, they do not state that their conclusions would be unaffected by their exclusion. Consequently it is in my view necessary to consider whether excluding those statements there is sufficient evidence on record to sustain the conviction of the accused.

By the Court:—The result of our judgments is that the petitions are dismissed.

1. (1908) I. L. R. 36. C. 281, at p. 286.
2. (1910) 7 A. L. I. 468.
3. (1907) I. L. R. 32 B. 111, at p. 142 and 143.

NOTES OF RECENT CASES.

Sundara Aiyar J.
Spencer J.
1911, *December* 14.
S. A. No. 1159 of 1910.

Aliyasantana Law—Right of maintenance.

(i) The Ejaman of an Aliyasantana family is not entitled to say that he will not maintain a member of the family unless he works.

(ii) A lady living away with her husband is not, by that reason, disentitled from claiming maintenance.

(iii) The right to claim separate maintenance depends upon the purpose of the stay of the junior member away from the family house. It is only if it is for an improper purpose that he or she is disentitled from claiming maintenance.

B. Sitarama Rao for appellant.

K. Narayana Rao for respondent.

Sundara Aiyar J.
Spencer J.
1911, *December* 29.
Cr. R. C. No. 516 of 1911.

Attachment of plantain bunches not in esse—Validity of—Conviction for removing, unsustainable.

Attachment of plantain bunches thereafter to appear is not attachment of growing crop and therefore invalid. A person removing such bunches in disobedience of the attachment is not guilty of any offence.

K. N Aiya Aiyar for petitioner.

Devadoss for *Public Prosecutor* contra.

Sundara Aiyar J.
Spencer J.
1911, *December* 29.
S. A. No. 1095 of 1910.

Subrogation—Reversioner paying off mortgage when property going to be sold—Entitled to subrogation.

(i) A Hindu reversioner is not "a person interested" within the meaning of S. 91 of the Transfer of Property Act.

(ii) But he is a person who is interested within the meaning of S. 69 of the Indian Contract Act.

(iii) Though not a person entitled of his own initiative to redeem a mortgage, when the property is put up for sale upon a binding mortgage, he may pay it up and claim a charge therefor.

(iv) There is no authority for saying that any person paying off a mortgage is entitled to claim a charge.

(v) Having regard to the requirements of registration, &c., even an agreement with the owner under which a stranger discharges a mortgage does not entitle him to claim to be subrogated to the discharged mortgage.

(vi) The case is different where a person having an interest or *bona fide* claiming an interest under a void or voidable conveyance, pays off an incumbrance to protect his own interest.

C. Krishnamachar for *K. Srinivasa Aiyangar* for appellant.

Respondent *unrepresented.*

Sundara Aiyar J.
Spencer J.
1911, *December* 29.
} Cr. Ap. No. 324 of 1911.

Handwriting expert—Uncorroborated evidence—Unsafe to act upon.

It is unsafe to act on the uncorroborated evidence of a handwriting expert.

Kunjunni Nair and *Annaji Rao* for appellant.

Public Prosecutor (C. F. Napier) for respondent.

Sundara Aiyar J.
Spencer J.
1912, *January* 2.
} S. A. No. 1391 of 1910.

Patta and Muchilika—Claims for rent for faslis previous to Estates Land Act—Suits brought after.

A suit for rent due for a fasli previous to the passing of the Estates Land Act but instituted after the Act came into force is not bad because there has been no previous tender of patta.

V. Ramesam for appellant.

P. Narayanamurthi for respondent.

Abdur Rahim J.
1911, *January* 2.
} Crl. A. P. 32 of 1911.

Ss. 299 *to* 301, *Penal Code--Murder by poison—Death of person other than the intended victim.*

It is not necessary for a conviction under Ss. 299 to 301, I. P. C., that the accused should have intended the death of the person actually killed. It is sufficient if the death of one was intended and that of another ensued, as reasonable and probable consequence of the accused's act.

The accused gave poisoned sweetmeat for *A* to take, intending to kill him thereby, but *A* after tasting it and finding it bad, threw it in a corner of the house, after which some children of the house took it up and swallowed it in consequence of which they died. *Held* that the accused was guilty of the murder of the children by poisoning.

Observations as to when under what circumstances the accused will and will not be guilty:

N. B—*Abdur Rahim* J. agreed with *Benson* J. who differed from *Sundara Aiyar* J.

Public Prosecutor (*C.F. Napier*) for the Crown (appellant).

K. N. Aiya Aiyar for accused.

Sundara Aiyar J.
Spencer J.
1912, *January* 3.
C. M. P. 498 of 1910.

Practitioner and client—Dismissal for default of practitioner—Fraud of vakil or his clerk—Effect of—Restoration of case, when—Principle of agency.

A practitioner is responsible to his client for the fraud of his clerks in the client's business, as if committed by himself.

A party is not responsible for the fraud or negligence of his or his practitioner's clerk.

The principle of agency does not strictly apply as between the client and the practitioner. A court is not always bound to restore a case dismissed for default of appearance of the practitioner. Restoration will depend upon the circumstances of each case.

A practitioner is not entitled to leave the argument of his cases to be managed by his clerks. The court has power to set aside a dismissal for default even when there is not sufficient cause.

The court may leave the client to have his remedy against the practitioner instead of restoring the case, where damages would be an adequate remedy. But where damages would not be an adequate remedy and the action is a representative action on behalf of others not on record, restoration will be the proper course.

T. Rangachari, *G. Krishnaswami Aiyar* and *G. S. Ramachandra Aiyar* for petitioner.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for respondent.

Sundara Aiyar J.
Spencer J.
1912, *January* 5.

S. A. No. 1537 of 1910.

Kazi Act (*Act XII of* 1880), *S.* 4—*Cause of action.*

A Kazi appointed under the Kazi Act has no right to restrain another person from discharging any of his functions or to sue for damages suffered by him by reason of such performance.

S. Annaji Rao for appellant.

B. Sitarama Rao for respondent.

Miller J.
Sundara Aiyar J.
1912, *January* 10.

S. A. 1349 and 1350 of 1910.

S. 92, *Evidence Act—Evidence to show a sale to be otherwise than a sale—Admissibility of.*

A document which purports to be a sale cannot be proved to be otherwise than a sale, though fraud, misrepresentation, want of consideration, etc., which will be good grounds of avoiding the effect of the document, may be proved. [*Balakrishna Doss* v. *Legge*[1] and *Achuta Rama Raju* v. *Subbaraju*[2] followed. *Maung Kyin* v. *Ma Shivba*[3] and *Kanif un-nissa* v. *Faiz-un-nissa*[4] explained. 8 Bom. L. R. 761, 764, 669, not approved.]

P. Narayanamurthy for appellant.

A. Ramachandra Aiyar for respondent.

Miller J.
Sundara Aiyar J.
1912, *January* 10.

S. A. 518 and 519 of 1910.

Ejectment—Landlord and tenant—Savaram lands—Right to eject.

There being no proof in the case that lands called 'Savaram' lands were equivalent to Kamatam or home farm lands though they were proved to be other than Jerayoti lands, it was *held* that the zemindar had not proved his right to eject.

Swaminadhan for appellant.

The Advocate General (*P. S. Sivaswami Aiyar*) for respondent.

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1. I.L.R. 22 A. 149.
2. I.L.R. 25 M. 7.
3. (1911) 2 M. W. N. 30.
4. I.L.R. 13 C. L. J. 150.

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NOTES OF RECENT CASES.

Benson J.
Sundara Aiyar J.
1911, *October* 1.
C. M. P. 2053 of 1911.

Suit by reversioner to set aside alienation—Abatement of, on death of the reversioner.

A suit to set aside alienation by a Hindu widow brought by a reversioner abates on his death and does not survive to the next reversioner.

P. Nagabushanam for petitioner.

L. A. Govindaraghava Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1912, *January* 16.
C. M. A. 61 of 1911.

Article 11 (*a*) of the Limitation Act does not apply if there is no investigation. Under the new Civil Procedure Code the court has ample discretion in the matter of allowing amendments.

K. V. Krishnaswamy Aiyar for appellant.

S. Muthia Mudaliar for respondent.

Benson J.
Sundara Aiyar J.
1912, *January* 16.
C. M. A. 28 of 1909.

Where on parties' agreement the amount deposited as compensation under the Land Acquisition Act was ordered by court to be in court's custody for four months and then to be taken over by one of the parties unless the other party files a suit within that time, the parties are estopped from questioning the jurisdiction of the Munsif's court in which the suit was filed to recover the portion of the money due to one of the parties. The Munsif has inherent jurisdiction if the amount be within his cognizance. The order passed by the court on consent cannot be attacked collaterally on any ground, *e. g.*, that moneys payable under the Land Acquisition Act ought to be adjudicated upon

only by the District Court. The proper course is to have the original order set aside.

C. V. Ananthakrishna Aiyar for appellant.
K. Srinivasa Aiyangar for respondent.

Miller J.
Sundara Aiyar J.
1912, *January* 17.
Cr. M. P. 11 of 1912.

Cr. P. C., S. 107, Cl. (4)—Powers not controlled by S. 496.

The powers conferred on a Magistrate by S. 107, Cr.P.C., Cl. (4), of detaining a person in prison are not controlled by S. 496, Cr. P. C., so as to compel the Magistrate to let him on bail when prepared to furnish security.

T. Rangachariar for petitioner.

Devadoss for Public Prosecutor.

Benson J.
Sundara Aiyar J.
1912, *January* 17.
C. M. A. 81 1911.

Power to compromise—Scope of.

A power conferred on a Vakil to compromise a suit, if he deems it proper, does not authorise him to give up possession to the other side and agree to reserve his client's claims (who was defendant) to be fought out by him as plaintiff in another suit.

P. V. Duraiswami Mudaliar for petitioner.

V. Ratnasomanathan for respondent.

Benson J.
Miller J.
1912, *January* 22.
S. A. 1182 & 1717 of 1910.

Interest, high rate of—Power to reduce.

In a suit by a mortgagee to redeem an earlier usufructuary mortgagee, the latter insisted upon the former redeeming another mortgage in his favour executed subsequently to the date of the usufructuary mortgage. The mortgage was for 150 mooras of rice and 75 Rs. cash and redeemable after 30 years. The interest provided for was 25 % on the paddy in kind and 6¼ % on the cash. Having regard to the long period, high rate of interest

and the rise in the value of the paddy, the lower court valued the paddy as at the date of the mortgage and allowed interest at 6¼ %. On appeal, *held* that the court had no power to act as it did, and their Lordships directed that interest should be calculated on the paddy at the stipulated rate in paddy and the same should be valued as on the date on which the accounts will have to be made up.

B. Sitarama Rao and *H. Balakrishna Rao* for appellant.

K. P. Laxmana Rao for respondent.

Benson J.
Miller J.
1912, *January* 24.
S. A. 1378 of 1910.

Hindu Law—Mortgage decree against father and court sale—Mortgage decree debt antecedent to sale—Sale binding on sons.

A mortgage decree against a Hindu father against whom personal remedy was barred will be an antecedent debt so as to support a court auction sale thereon against the sons.

C. S. Venkatachari for appellant.

M. B. Doraiswami Aiyangar for the respondent.

Benson J.
Miller J.
1912, *January* 24.
S. A. 1219 of 1909.

Agreement to take and abide by oath—Resiling from agreement—Effect of.

The defendant agreed with the plaintiff that he would take an oath in respect of a portion of the subject-matter and in the event of plaintiff's resiling, a decree ought to be passed against him in respect of that portion. On plaintiff resiling, *held*: the court could not give effect to the agreement, as the burden of proof was on the defendant in this case, the only effect of such an agreement being to prevent the plaintiff from adducing evidence in support of his claim.

L. A. Govindaraghava Aiyar for appellant.

C. S. Venkatachari for respondent.

Abdur Rahim J.
Sundara Aiyar J. } C. M. A. 19 of 1911.
1912, *January* 24.

Succession Certificate Act—Minor—Issue of certificate to.

There is nothing in the Succession Certificate Act to prevent the issue of the certificate to a minor.

B. Narasimha Rao for appellant.

T. V. Sheshagiri Aiyar for respondent.

Abdur Rahim J.
Sundara Aiyar J. } C. R. P. 484 of 1909.
1912, *January* 24.

Contract of service for a term of 6 months—Monthly pay—Implied term—Servant not bound to continue in spite of default.

When a person is retained as a servant for 6 months on a monthly pay, it is to be taken as an implied term in the contract that the servant is not bound to continue if his pay is kept in arrears.

T. Arumainadhan Pillai for petitioner.

S. Subrahmanya Aiyar for respondent.

Benson J.
Miller J. } S. A. No 1641 of 1910.
1912, *January* 25.

Suit by worshippers for possession—Decree in favour of trustee.

In a suit by worshippers to declare the court sale in favour of the 4th defendant in the case invalid and to recover possession it was alleged in the plaint that the trustee who was the 1st defendant was in possession, though by collusion he was putting forward the title of the 4th defendant. The 1st defendant's contention was that he was in possession and therefore, the suit was to be dismissed. The court found that the sale was invalid, that the 4th defendant was in possession as he contended and made a decree in favour of the 1st defendant. *Held*, under the circumstances, the decree was a proper one as the 4th defendant had no title to remain in possession and there was a prayer of possession.

T. R. Ramachandra Aiyar for appellant.

C. V. Anantakrishna Aiyar for respondent.

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Miller J.
Sundara Aiyar J. } C. R. P. 728 of 1911.
1912, *January* 30.

Suits Valuation Act, *S.* 8—*Civil Courts Act* (*Madras*), *S.* 1—*Suit for partition.*

In suits for partition coming within S. 7, Cl. (iv), of the Court Fees Act, the valuation for jurisdiction is the same as that for court-fee.

T. Prakasam for petitioner.

T. Ramachandra Rao for respondent.

Sundara Aiyar J. } C. M. P. 96 of 1912.
1912, *February* 1.

C. P. C., *Order* XXII, *r.* 10—*Assignment—Not limited to assignment by parties.*

There is nothing in O. XXII, r. 10, C. P. C., to restrict it to assignees from parties; the rule does apply also to cases where the assignment is by the representative before he is brought on record.

V. Ramesam for *P. Narayana Murthi* for petitioner.

V Ramadoss for respondent.

Sundara Aiyar J. } S. A. 945 of 1911.
1912, *February* 1.

Hindu Law—Nucleus—Unproductive.

A thatched house which alone formed the ancestral estate of a Hindu family of two brothers cannot be said to be the nucleus of their joint trade unless it is shown that it was sold and its proceeds were utilised for the trade.

T. M. Krishnaswami Aiyar for appellant.

Sundara Aiyar J. } S. A. 799 of 1911.
1912, *February* 1.

Registration Act, *S.* 17.

An agreement to give up possession of land belonging to another does not require registration.

V. Purushotham Aiyar for appellant.

Benson J.
Rahim J.
1912, *February* 2.

Ref. Trial 54 of 1911.

Evidence Act, Ss. 32, 60—*Oral dying declarations—How to prove.*

The proper way of proving oral dying declarations is to call the persons who actually heard them to depose to what they heard and not to ask them whether what they have recorded on a piece of paper as the dying declaration is a correct representation of the dying declaration. Such writings are not evidence without formal proof of the oral dying declaration.

N. Rajagopalachari for appellant.

M. D. Devadoss for Public Prosecutor.

Miller J.
Sundara Aiyar J.
1912, *February* 2.

C. R. P. 737 of 1910.
C. R. P. 740 of 1910.

Adjustment—Agreement to abide by decision in another suit.

An agreement to abide by the decision in another case in another court is not an adjustment or any other method of disposal of a suit and cannot be given effect to.

S. Subramania Aiyar for petitioner.

Dr. Swaminathan for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1912, *February* 6.

C. M. A. 63 of 1911.

Appeal—Remand order—Ex-parte decree—Setting aside without reason, irregular.

No appeal lies against an order by the appellate court remanding a suit which was decreed *ex-parte*, setting aside the *ex-parte* decree. But if the court sets aside the *ex-parte* decree without assigning any reason sufficient in law to set aside an *ex-parte* decree the court will interfere with the order in the exercise of its revisional powers under S. 115, C.P.C.

L. A. Govindaraghava Aiyar for appellant.

C. Padmanabha Aiyangar for respondent.

Abdur Rahim J.
Sundara Aiyar J. } L. P. A. 45 of 1911.
1912, *February* 7.

Contribution between 2 trustees—Admission of existence of trust money—Onus of proof.

Where the plaintiff and the defendant's deceased father were appointed trustees by their community to collect subscriptions and to file suits on behalf of the community, in a suit for contribution by the plaintiff on the ground that he alone was obliged to pay the costs of the suits, the onus will lie upon him to show, if once he admits that he and the defendant's father collected monies for filing suits, that he had spent away all the monies, that he was obliged to pay the costs out of his pocket and that he had no trust money to reimburse himself at the time of filing the suit.

N. Rajagopalachari for appellant.

V. C. Seshachariar for respondent.

Benson J.
Bakewell J. } S. A. 1406 & 1424 of 1910.
1912, *February* 9.

Limitation Act, Art. 44—*Sale by guardian.*

A minor ought to bring a suit to set aside a sale by the guardian within 3 years of his attaining majority irrespective of whether the alienation is within 12 years or not from the date of suit.

M. D. Devadoss for appellant.

T. Natesa Aiyar for respondent.

Sundara Aiyar J.
1912, *February* 9. } C. R. P. 131 of 1911.

Contract Act, S. 74—*Compound interest with 6 monthly rests—Whether penalty.*

Where a bond stipulated for 2 per cent simple interest and for 2 per cent compound interest with 6 monthly rests in case of default :

Held. that as compound interest is usually calculated only with rests the stipulation of the bond was not penal and that it ought to have been allowed.

N. Rajogopalachari for petitioner.

T. Arumainatham Pillai for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1912, *February*, 14.

A. S. 68 of 1910.

Court Fees Act—Suit for partition—Valuation in appeal—Appeal from preliminary decree—Stamp—Court-fee not payable by defendant in partition suit as written statement.

In suits for partition to which S. 7, Cl. (iv) (*c*) of the Court-Fees Act applies, when the subject-matter of the appeal is the same as that in the suit, the appellant is bound by the valuation put by the plaintiff in his plaint.

In an appeal from a preliminary decree directing the plaintiff to be put in possession of his share, *ad valorem* court fee ought to be paid.

There is no law which requires a defendant in a partition suit to pay court fee in respect of properties which he says plaintiff is in possession of and ought to bring into the hotch-pot before he can seek partition.

K. Ramanath Shenoi for appellant.

J. L. Rosario for respondent.

Chief Justice
Sankaran Nair J.
Ayling J.
1912, *February* 14.

Cr. R. Mis. Petn. 34 of 1912.

Cr. P. C., S. 397—*Concurrent sentence—High Court Sessions—Power to inflict.*

Having regard to S. 397, Cr. P. C., a judge of the High Court sitting in the Sessions has no power to punish a man so as to make his sentence run concurrently with his sentence passed in another trial.

The Advocate-General (*P.S. Sivaswami Aiyar*) for the Crown.

The accused *not represented.*

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C.M.P. 293 of 1912.
C.M.A. 28 and 29 of 1912.

Security—Right of restitution in the event of success if could be tendered.

Where an order has been made permitting the plaintiff in a redemption action to execute the decree pending appeal by the defendant only on furnishing security for the mesne profits of the land for 3 years, plaintiff offered the mortgage amount deposited by him which the defendant would be bound to restore in the event of his success, as security: *Held* by *Abdur Rahim* J. that, that security might be legally tendered; by *Sundara Aiyar* J. that such a contingent right could not be offered as security.

G. S. Ramachandra Aiyar for petitioner.

The Advocate-General (*P. S. Sivaswami Aiyar*) and *S. Muthia Mudaliar* for respondent.

Miller J.
Abdur Rahim J.
1912, *February* 19.
S. A. 1395 of 1910.

Action for rent under registered kabuliat — Limitation—Barred when the new Act came into force if the new rule is applied.

Miller J:—The 3 years rule of limitation to action for rent laid down by the Estates Land Act does not apply to claims for rent under registered kabuliats more than 3 years old at the date the Act came into force. An intention to give retrospective effect to an enactment cannot properly be inferred when there is no appreciable interval between the date it became law (here by the consent of the Governor-General) and the date of its coming into force.

Abdur Rahim J.:—The wording of the Act is clear and the rule of presumption against retrospective operation has no application.

The Advocate-General (*P. S. Sivaswami Aiyar*) for appellant

C. Padmanabha Aiyangar for respondent.

Benson J.
Sadasiva Aiyar J.
1912, *February* 27.
S. A. 805 of 1910.

Appeal—Powers of appellate court—Admission of fresh evidence.

Under the Civil Procedure Code of 1908, the appellate court has wider powers of admitting fresh evidence than under the old code. It is sufficient if the reasons for such admission appear upon the face of the judgment.

T. Rangachari and *K. V. Krishnasami Aiyar* for appellant

V. V. Srinivasa Aiyangar for respondent.

Benson J.
Sundara Aiyar J. } S. A. 1521 of 1910.
1912, *Febry.* 28.

Mortgage or charge—Compromise decree—Construction of.

The construction of a compromise decree follows that of the compromise which precedes it.

It is not correct to say that a mortgage cannot be created by a compromise decree but only a charge.

A. Krishnaswami Aiyar for appellant.

G. S. Ramachandra Aiyar and *T. M. Krishnaswami Aiyar* for respondent.

Benson J.
Sundara Aiyar J. } S. A. 433 of 1910.
1912, *Febry.* 28.

Limitation Act, Ss. 4, 5, 14—*Filing suit in a wrong court after summer holidays—Effect of.*

A suit which is presented to a court after being returned by a court which had no jurisdiction, for presentation to the proper court is not the same suit as the one before and therefore if the previous suit had been presented in the wrong court after the period of limitation which expired during the summer holidays of that court the period of pendency of that suit cannot be deducted so as to avoid the bar of limitation.

T. M. Krishnaswami Aiyar for appellant.

V. Visvanatha Sastri for respondent.

Benson J.
Sundara Aiyar J. } S. A. 226 of 1910.
1912, *Febry.* 28.

Limitation Act, S. 23—*Art.* 36—*Enticing away a married woman and adultery—Continuing wrong*

The wrong of adultery is a continuing wrong so long as the wife and the adulterer live together and the husband's cause of action to sue for damages does not end on the date of enticing.

N. Rajagopalachari for appellant.

K. N. Aiya Aiyar for respondent.

Benson J.
Sundara Aiyar J. } Cr. Mis. Petn. 29 of 1912.
1912, *February* 29.

Criminal Procedure Code, S. 198—*Aggrieved person—Bigamy.*

The father of a woman is not an aggrieved person within the meaning of S. 198 of the Criminal Procedure Code to complain of bigamy when the husband is alive and competent.

The Public Prosecutor (J. L. Rosario) for the Crown.

NOTES OF RECENT CASES.

Benson J.
Sundara Aiyar J. } C. R. P. 852 of 1910.
1912, *March* 1.

Attachment of money deposited as security—Prior assignee of the same—Attachment without notice to fund-holder—Auction purchaser—Transfer of Property Act, S. 130.

The auction-purchaser of the interest of the judgment-debtor in certain amounts deposited with his employers as security cannot set up his title against an assignee of the same prior to attachment though no notice of the assignment had been given to the employer. The position of the auction-purchaser, whether with or without notice, is the same as that of the judgment-debtor. The principles of S. 130, Transfer of Property Act, ought to be applied even to cases of choses of action not coming within the definition of 'actionable claims' in the Transfer of Property Act.

R. Kuppusami Aiyar for petitioner.

C. V. Anantakrishna Aiyar for respondent.

Benson J.
Sundara Aiyar J. } L. P. A. 31 of 1911.
1912, *March* 1.

Hindu Law—Reversioner—Suit for purchase money as heir—Cannot sue, repudiating the sale.

The reversioner suing as heir of the deceased widow is not entitled to recover the balance of purchase-money due from the vendee of a portion of the estate when he repudiates the sale as one not binding against himself.

B. Sitarama Rao for *S. Muthia Mudaliar* for appellant.

Vishvanatha Shastry for respondent.

Sankaran Nair J.
Ayling J. } Cr. R. C. 12 of 1911.
1912, *March* 4.

Cr. P. C., S. 423*—Charge for main offence—Conviction for abetment on appeal, not proper.*

Following *Padmanabha Panjikannaya* v. *The Emperor*[1], their Lordships reversed a conviction for abetment in appeal when the charge was for the main offence and the accused was acquitted of it in appeal.

S. Swaminathan and *Muthia Mudaliar* for petitioner.

Public Prosecutor (*J. L. Rosario*) for the Crown.

Benson J.
Miller J.
1912, *March* 5. } S. A. 1668 of 1910.

Evidence—Adjudication as to necessity in suit between one reversioner and alienee, not in suit between other reversioners and alienee.

An adjudication in a suit between an alienee from the widow and one of the reversioners that the alienation was for necessity is not evidence of such necessity as between other reversioners and the alienee.

T. R. Ramachandra Aiyar for appellant.

S. T. Srinivasagopalachariar and *C. Padmanabha Aiyangar* for respondents.

Benson J.
Miller J.
1912, *March* 5. } S. A. 1719 of 1910.

Presumed accuracy of official statements — Interference in second appeal.

The accuracy of a statement prepared by the Revenue department that a particular field was cultivated, on the footing of which the plaintiff had to pay revenue which the defendant was bound to pay, need not be proved by the evidence of some one present on the spot at the time the inspection of the field was made. Where the sole evidence in the case for such payment was the statement and the lower appellate court had dismissed the suit simply on the ground that the accuracy of the same was not proved, their Lordships interfered in second appeal reversing the lower appellate court's judgment and restoring that of the Munsif who had decreed on the strength of the statement.

K. Srinivasa Aiyangar for appellant.

R. Kuppusami Aiyar for respondent.

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1. (1909) I.L.R. 33 M. 264.

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FULL BENCH.

Chief Justice.
S. Nair J.
Rahim J.
Ayling J.
Sadasiva Aiyar J.
1912, *March* 1.

Crl. R. C. 498 of 1911.

Cr. P. C. Ss. 195, 428, 429, 439,—*Appeals—Powers of High Court in case of difference of opinion—S.* 36, *Letters Patent.*

The view of the Full Bench in *Muthusami* v. *Veeni Chetti*[1] was confirmed by the above Full Bench as regards the maintainability of appeals under S. 195, Cr. P. C.

The High Court while hearing appeals under S. 195, Cr. P. C., exercises a special jurisdiction and not either an appellate or revisional Jurisdiction under the appeal and revision chapters of Cr. P. Code. So if the Judges of the High Court differ in opinion while hearing an appeal under S. 195, Cr. P. C., the procedure to be followed is that prescribed in Cl. 36 of the Letters Patent and not that prescribed either in S. 429 or 439, Cr. P. C.

L. A. Govindaraghava Aiyar and *K. Jagannada Aiyar* for petitioners.

M. D. Devadoss for Public Prosecutor.

Benson J.
Rahim J.
1912, *March* 6.

C. M. A. 78 of 1910.

Attachment under C. P. C. 1882—*Subsistence of, a question of intention—Res judicata in execution proceedings—Art.* 178, *Limitation Act* (1877)—*Execution application dismissed for non-prosecution—Next application to sell attached properties.*

Under C. P. C., 1882, the subistence of an attachment once made is a question of intention. Where, after effecting an attachment, the court dismissed an execution application. for non-prosecution, and then the court allowed an application for sale of

1. (1907) I. L. R. 30 M. 382.

some of the properties already attached, not only is an intention to continue the old attachment made clear but also the order for sale as if the attachment still subsisted acts as *res judicata* when other attached lands are sought to be sold without a further attachment.

So long as the old attachment subsists, the right to sell accrues from day to day under Art. 178, Limitation Act of 1877.

N. Rajagopalachari for appellant.

T. Rangachari and *T. Narasimha Aiyangar* for respondent

FULL BENCH.
Chief Justice.
S. Nair J.
Ayling J.
1912, *March* 15.

Crl. R. C. 216 of 1911.

S. 499, I. P. C.—Defamation by accused—Absolute privilege.—A defamatory statement made by an accused person in answer to questions put by the court is absolutely privileged and he cannot be prosecuted for defamation.

B. Narasimha Rao for petitioner.

Public Prosecutor (J. L. Rosario) for the Crown.

FULL BENCH.
Chief Justice
S. Nair J.
Ayling J.
1912. *March* 15.

Crl. R. C. 421 of 1911,

S. 499, I. P. C.—Defamation before Registration officer—Not absolutely privileged—Registrar not a court.

A registration officer is not a court and therefore defamatory statements made before him are not absolutely privileged and are, so far as criminal prosecutions therefor are concerned, governed by the provisions of Ss. 499 and 500, I. P. C.

V. Venkatachari for complainant.

B. Narasimha Rao for accused.

NOTES OF RECENT CASES.

Chief Justice.
Sadasiva Aiyar J.
1912, *March* 6.

Ap. 95, 96 of 1909.

Limitation Act, S. 12—Calling for stamp papers during Christmas holidays—Holidays to be included as time requisite for obtaining copies.

Even if stamp papers are called for during the Christmas holidays in respect of copies of decree and judgment applied for, and not supplied, by the party, the holidays should, in computing the time requisite for obtaining copies, be excluded as time requisite for copies in favour of the applicant.

T. Narasimha Aiyangar for appellant.

V. C. Seshachariar, T. Natesa Aiyar and *C. S. Venkatachari* for respondent.

Benson J.
Sadasiva Aiyar J.
1912, *March* 6.

S. A. 1402 of 1910.

Limitation Act, Art. 36—Money given to be utilised as security misapplied.

Where the Karnavan of a Malabar Tarwad gave some money to his Anandravan to be utilised as security for some office which he held, and after he ceased to hold the office the Anandravan used the money for his own purposes without returning the same to the Karnavan, the proper article of the Limitation Act applicable to a suit for recovery of the money from the Anandravan is Art. 36, the general residuary article for torts.

C. V. Ananthakrishna Aiyar for appellant.

J. L. Rosario for respondent.

Benson J.
Sundara Aiyar J.
1912, *March* 21.

S. A. Nos. 732 and 734 of 1909.

Partial partition—Suit liable to be dismissed not a rigid rule.

It is not a rigid rule of law that a suit for partition by the alienee of a coparcener's interest in a portion of the family property should be dismissed if the suit does not embrace the entire family property. The rule is that such a suit is liable to be dismissed; and it is also open to the other members of the family to insist that they would be divided *inter se*. But if no such application is made by them and if also there are no equities to adjust and two courts have given the plaintiff a decree, the High Court is not bound in S. A. to dismiss the suit or direct the plaintiff to alter the suit into one for general partition.

K. Ramachandra Aiyar and *T. M. Krishnasami Aiyar* for appellant.

C. V. Ananthakrishna Aiyar for respondent.

Benson J.
Sundara Aiyar J.
1912 *March*, 21.

L. P. A. 103 of 1910.

Suit for dissolution of partnership—Plaintiff dying and defendant becoming a representative—Suit may continue on the new basis.

Where in a suit for dissolution of partnership the plaintiff dies and as a result one of the defendants becomes entitled to the interest of the plaintiff it is open to the court to permit the plaint to be so amended as to include the claim of the defendant and to have the suit decided on that basis.

L. A. Govindaraghava Aiyar for appellant.

V. N. Kuppu Rao for respondent.

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Miller J.
Sankaran Nair J. } S. A. 1582 of 1910.
1912, *March* 26.

Limitation Act, Art. 127—*Exclusion—Exclusion from one family house, living in another.*

Where a member of a Hindu family is made to go out from the family dwelling house but resides in another house belonging to the family, it could not be said that he is excluded from the family property within the meaning of Art. 127 of the Limitation Act. If, on the other hand, he occupies a house which does not belong to the family, the court may properly come to the conclusion that he has been excluded.

T. R. Venkatarama Sastri for appellant.

T. V. Seshagiri Aiyar and *N. R. K. Thathachari* for respondent.

Sankaran Nair J.
1912, *March* 27. } C. R. P. 364—371 of 1909.

Res judicata—Suit for rent—Decision of a revenue court for one fasli—Whether binding in civil courts for subsequent faslis.

The decision of a revenue court as regards the rent for one fasli is conclusive as regards the rent for that fasli both in the revenue and in the civil courts. But as regards rent for subsequent faslis the prior decision of the same court is not conclusive in the civil courts.

V. C. Seshachariar for petitioner.

S. Sundararaja Iyengar for respondent.

Abdur Rahim J.
Sundara Aiyar J. } C. M. A. 235 of 1908.
1912, *March* 27.

C. P. C., S. 310-*A—Decree amount—Adjustable with decree-holder instead of actual payment.*

Under S. 310-A of the C. P. C. of 1882, actual payment of the decree amount is not always a condition precedent. Adjustment with the decree holder, which operates as a discharge of the decree, is quite as good.

L. A. Govindaraghava Aiyar for appellant.

T. Prakasam for respondent.

Chief Justice.
Sankaran Nair J.
1912, *March* 28.

S. A. 253 of 1910.

Hindu Law—Sale by junior widow—Senior widow, not bound.

A sale by a junior widow, though for the purpose of discharging the debts of the husband, would not be binding on the senior widow, when she was denying the rights of the other widow and the purchaser was aware of the fact; nor would there be any equity in favour of the purchaser in respect of the price paid.

C. Narasimhachari for appellant.

K. R. Subrahmania Sastri for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1912, *March* 29.

S. A. 1380 of 1910.

Limitation—"Part payment", "payment of interest as such"—Payment towards debt, if sufficient, when in writing.

A debtor who owed several debts made a payment towards his debts and the payment was also in writing. It was argued that it did not suffice to save limitation as it did not appear that it was paid either as part-payment of the principal or interest. *Held*: the payment must have been either towards interest, or principal, or both. If the first, it did not require writing; if the second, there was writing; if the last, then again, there being writing, no question of limitation could arise.

C. S. Venkatachari for appellant.

K. Srinivasa Aiyangar for respondent.

Abdur Rahim J.
Sundara Aiyar J.
1912, *March* 29.

S. A. 1694 of 1909.

Government land—Adverse possession.

When a person is in possession of Government land for a number of years, cultivating it, the possession is adverse to the Government and after the statutory period Government's right to assign it to another would be lost.

T. R. Ramachandra Aiyar and *M. B. Doraisami Aiyangar* for appellant.

Swaminathan for Government Pleader and *V. Masilamoni Pillai* for respondent.

NOTES OF RECENT CASES.

Chief Justice
Ayling J.
1912, *April* 11.

S. A. 1425 of 1910.

Landlord and Tenant—Forfeiture of tenancy created before Transfer of Property Act—Suit in ejectment—No previous act necessary.

In the case of a forfeiture in leases before the Transfer of Property Act no previous act on the part of the landlord showing an intention to avail himself of the forfeiture is necessary before suing in ejectment.

B. Narasimha Rau for appellant.

K. P. Lakshmana Rao for respondent.

Chief Justice
Ayling J.
1911, *April* 11.

C. M. P. 1155 of 1911.

C. P. C., S. 110—*Value of the subject-matter—Not dependant upon valuation for purposes of court fees.*

The value of the relief sought (in this case, injunction) as calculated for the purposes of the Court-fees Act is not conclusive as to the value to be put upon it for the purpose of the appeal to the Privy Council

[*Hari Mohan* v. *Surendra Narain* [1] followed.]

K. Srinivasa Aiyangar for appellant.

Acting Government Pleader for respondent.

Benson J.
Wallis J.
1912, *April* 11.

S. A. 623 & 669 of 1907.

Transfer of Property Act, Ss. 60, 61, 91, 95—*Mortgage of many items to several people—One mortgagee alone buying some items—Redemption, right of, of whole—Consolidation of two mortgages when the mortgagees in both are not identical—Right of.*

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1. (1903) I. L. R. 31 C. 301.

A mortgage is generally single and indivisible. If one of several mortgagees buys only some items of mortgaged properties, he cannot thereby deprive the mortgagor of his right to redeem the whole of the mortgage.

Consolidation of mortgages cannot take place unless the mortgagees in both are identical.

N. Rajagopalachari for appellant.

S. Srinivasa Aiyangar and *S. Subramania Aiyar* for respondents.

Miller J.
Sadasiva Aiyar J.
1912, *April* 12.

C. M. A. 221 of 1910.

A transferee of a decree whose right to execute the decree has not been recognised and execution directed at his instance under S. 232, C. P. C., is none the less a decree-holder within the definition of 'decree-holder' in S. 2, and the judgment-debtor is entitled to rely on any payment made to such transferee in abatement of the amount due under the decree provided such transferee has certified the payment to court within the time limited by law.

T. V. Seshagiri Aiyar for appellant.

K. V. Krishnaswami Aiyar for respondent.

Sankaran Nair J.
Abdur Rahim J.
1912, *April* 15.

S. A. 1583 and 1607 of 1910.

Receiver—Landlord and Tenant—Proper person to sue and be sued.

When a receiver is appointed in respect of the tenant's interest, he is the proper person to sue and be sued for the exchange of putta and muchilika, and the dismissal of an action brought against the tenant for that purpose was held to be properly dismissed.

T. V. Gopalasamy Mudaliar for appellant.

B. Sitarama Rao for respondent.

NOTES OF RECENT CASES.

Benson J.
Sundara Aiyar J.
1912, *April* 15.

S. A. 1009 of 10.

Landlord and Tenant—Partial Eviction—No suspension of rent—Set off of damages and rent.

In an action for rent by the landlord the tenant is not entitled to plead a partial eviction from the holding by the wrongful act of the landlord as a bar to the action but the court can direct the claim for rent to be set off against the tenant's claim for damages against the landlord.

N. T. Shamanna for appellant.
C. V. Ananthakrishna Aiyar for respondent.

Miller J.
Sadasiva Aiyar J.
1912, *April* 16.

C. M. S. A. 84 of 1910.

S. 232 C. P. C. (1882)—Application merely to recognise transfer of decree—Not maintainable.

No application will lie merely to recognise the petitioner as the transferee of a decree. *Ramachandra Aiyar* v. *Subramania Chettiar*[1] followed.

S. Ranganada Aiyar for appellant.
T. V. Muthukrishna Aiyar for respondent.

Wallis J.
Ayling J.
1912, *April* 18.

O. S. A. 21 of 09.

Insolvency—Banker and employee—Security amount with authority to deposit—No preference.

In a case where an employee of the firm of the late Arbuthnot & Co. deposited a certain amount as security with them with liberty to deposit the same in their firm, (interest being paid to him), *Held* he was not entitled to preference; the contract between the parties authorising investment deprived the depositor of whatever preference he could have been entitled to in respect of the security amount.

T. V. Seshagiri Aiyar for appellant.
K. Ramanatha Shenai for respondent.

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1. (1903) 14 M. L. J. 393.

Chief Justice
Ayling J. } S. A. 1473 of 09.
1912, *April* 18.

Custom governing succession in religious institution—meaning of,—Practice.

What is meant by custom governing the succession of trusteeship of a religious institution is not immemorial usage but the practice of the institution from which the intention of the founder is presumed.

K. Narayana Rao for appellant.

B. Sitarama Rao for respondent.

Wallis J,
Ayling J. } S. A. 1366 of 10.
1912, *April* 18

Implied contract from uniform rate of commutation—Question of fact.

It is a question of fact in each case whether a contract ought to be implied to commute the rent when payment has been made at a uniform rate of commutation for a long number of years and a finding refusing to draw the inference cannot be interfered with in second appeal.

K. Ramanatha Shenai for appellant.

B. Sitarama Rao for respondent.

Miller J.
Sadasiva Aiyar J. } C. M. S. A. 86 of 1910.
1912, *April* 19.

Art. 182, Limitation Act—Mortgage decree—Limitation from the date of order absolute.

The Judgment of the Privy Council reported in 33 All. 264 practically overrules the full Bench Judgment reported in 25 Mad. 244 and the starting point of limitation for execution of mortgage decrees is the date of the order absolute.

B. Sitarama Rao for appellant.

B. Narasimha Rao for respondent.

Wallis J.
Ayling J. } S. A. 2095 of 1910.
1912, *April* 19.

Specific Relief Act Ss. 15, 17—Contract to sell by a Hindu father having major and minor sons—No necessity.

A contract to sell lands made by a Hindu father, who had 3 major and 4 minor sons could not be enforced against any of them

in the face of the finding that there was no necessity to sell the same. Compelling the father to sell the sons' shares also would leave open a litigation between the buyer and the sons; so also decreeing in respect of the father's share alone (*i.e.* a part) would be against S. 17 of the Specific Relief Act. 32 M. 320 dissented from.

E. V. R. Sarma and *P. Nagabhushanam* for appellant.

T. Prakasam for respondent.

Sundara Aiyar J.
Ayling J.
1912, *April* 23. — S. A. 1484, 1590, of 1909.

Religious Endowment—Conflict between usage and texts.

Where there is a conflict between the usage of a temple and the texts which are believed to be authoritative expositions of the practices that ought to prevail in temples unless it is proved that the texts have been accepted as a part of the usage of the temple and unless the texts are of such coercive or compelling character as to render a usage to the contrary wholly illegal or improper, the usage ought to be given effect to.

T. R. Ramachandra Aiyar for appellant.

T. Rangachari for respondent.

Sundara Aiyar J.
Ayling J.
1912, *April* 23. — S. A. 64 of 1911.

Possessory Title—Good against all but rightful owner.

Possession is title against all but the rightful owner and entitles the person in possession to maintain a suit against any person wrongfully disturbing the same.

P. S. Subrahmania Aiyar for appellant.

B. Narasimha Rao for respondent.

Chief Justice
Ayling J.
1912, *April* 24. — S. A. 2101 of 1910.

Kumaki right in South Canara—Easement—Not transferable apart from the holding.

Kumaki right is in the nature of an easement and cannot be transferred apart from the holding to which it attaches. Any arrangement by which it is dissevered from the holding is void.

B. Sitarama Rao for appellant.

K. Narayana Rao for respondent.

Sundara Aiyar J.
Ayling J.
1912, *April* 24.

S. A. 37 of 1911.

Finding document not given effect to—Meaning and legal effect of.

The finding that a document was not given effect to is not the same as a finding that the document was not intended to be given effect to. A document of sale when registered conveys title and the fact that parties subsequently do not choose to give effect to it is immaterial unless such intention is embodied in a registered document or is accompanied by adverse possession for over 12 years by the vendor.

T. V. Seshagiri Aiyar for appellant.

T. R. Venkatarama Sastri for respondent.

Miller J.
Sadasiva Aiyar J.
1912, *May* 1.

C. M. P. Nos. 10 and 75 of 1911.

C. P. C, Ss. 374 & 525—Private reference pending litigation—Adoption of opinion of stranger—Misconduct.

There is nothing to prevent a private reference pending a suit and if an award is given as a result of such reference, the award may both be filed under Sec. 525 C. P. C. and made a decree of court as an adjustment under Sec. 375, C. P. C. It is not misconduct for the arbitrators to hear the opinion of strangers in the presence of the parties and even adopt it provided they do not surrender the judgment and adopt his opinion contrary to their own opinion on the matter.

K. Srinivasa Aiyangar and *B. Sitarama Rao* for appellant.

T. Rangachari and *T. M. Krishnasawmy Aiyar* for respt.

Benson J.
Sundara Aiyar J.
1912, *May* 3.

Crl. R. C. 107 of 1912.

Criminal proceedings—Institution of—Statement to Police.

Mere statement to the police that the complainant suspects a particular person and also states the facts on which the suspicion is founded, does not amount to the institution of a criminal proceeding when the police choose to act on such statement and prosecute the man.

E. R. Osborne for petitioner.

Public Prosecutor (J. L. Rosario) contra.